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No. 2936

No. 14741

United States
Court of Appeals
for the Ninth Circuit.

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-14-55

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 8

Attorneys, Names and Addresses of..... 1

Certificate of Clerk to Record on Appeal..... 116

Complaint 3

Ex. A—Promissory Note 7

Findings of Fact and Conclusions of Law..... 22

Judgment 31

Notice of Appeal..... 32

Order for Judgment in Favor of Defendant.. 21

Stipulation Re Record on Appeal..... 119

Transcript of Proceedings..... 33

Witnesses:

Cebrian, Ralph

—direct 52, 68

—cross 73

Colville, Wilma Urch

—direct 45

—cross 47

Koch, Edwin

—direct 96

—cross 112

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In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 32020

CHARLES J. COLVILLE,

Plaintiff,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant.

COMPLAINT

1. Plaintiff is a citizen of the Dominion of Canada and defendant is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. On November 15, 1932, one Edward Cebrian, now deceased, executed and delivered to one John S. Barbee, now deceased, a promissory note, a copy of which is hereby annexed as Exhibit A, whereby Edward Cebrian promised to pay to the order of John S. Barbee six months after date the sum of $10,276.92 with interest at the rate of six per cent per annum from date until paid, without defalcation, interest payable at maturity and thereafter semi-annually until paid in full.

3. On or about May 15, 1933, said John S. Barbee assigned said promissory note to Van-Meter

Terrell Feed Company, a sole proprietorship, of which one Baylor Van-Meter was the sole owner.

4. On or about June 6, 1945, said Baylor Van-Meter died at Lexington, Kentucky. On or about June 16, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed executor of his estate and on or about August 24, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed trustee of the estate of Baylor Van-Meter, deceased.

5. On or about May 24, 1950, said First National Bank and Trust Company, as executor and trustee of the estate of Baylor Van-Meter, deceased, duly assigned said promissory note to Charles J. Colville, the plaintiff in this action.

6. On or about June 6, 1944, said Edward Cebrian died in the County of Los Angeles and State of California.

7. At the date of his death, said Edward Cebrian owed to said Baylor Van-Meter the amount of said note with interest at the rate of 6% per annum from November 15, 1932, compounded semi-annually. No one has ever paid the amount of said note and interest aforesaid to said Baylor Van-Meter or to his successors in title; and the amount of said note and interest aforesaid is now due and owing to plaintiff.

8. At the date of his death, said Edward Cebrian was a resident of the County of Los Angeles, State

of California, and he left an estate in said County and elsewhere in the State of California.

9. Immediately after the death of Edward Cebrian, the defendant, Isabelle C. Koch, wrongfully and fraudulently inter-meddled with the proper probate of the estate of Edward Cebrian and fraudulently and wrongfully retained, assumed and obtained possession and control of all of the property owned by said Edward Cebrian at the date of his death.

10. More specifically, on or about February 9, 1945, the defendant, Isabelle C. Koch, executed a petition for letters of administration in the matter of the estate of Edward Cebrian, and caused said petition to be filed in the Superior Court for Los Angeles County on or about February 20, 1945, under file 240,761. The defendant, Isabelle C. Koch, failed to deliver to the jurisdiction of the Superior Court of Los Angeles County any of the property then in her possession or thereafter coming into her possession, belonging to the estate of said Edward Cebrian. Indeed, defendant, Isabelle C. Koch, failed to prosecute said petition with diligence and permitted her petition to go off calendar.

11. On the contrary and contemporaneously with the execution and filing of said petition for administration, and at all times thereafter, said defendant fraudulently concealed the existance of the assets of said Edward Cebrian and fraudulently intermeddled with the jurisdiction of the Los Angeles

Superior Court over such assests. More specifically, on or about February 9, 1945, said defendant, Isabelle C. Koch, executed a second petition for administration of the estate of said Edward Cebrian in which she falsely and fraudulently represented that said Edward Cebrian was a resident of the City and County of San Francisco, whereas she knew the fact to be that said Edward Cebrian was a resident of the County of Los Angeles at the time of his death. Thereafter, said defendant, Isabelle C. Koch, caused said false petition to be filed in the Superior Court for the City and County of San Francisco as file No. 98563. The Superior Court for the City and County of San Francisco relied upon the fraudulent representations which defendant Isabelle C. Koch made as aforesaid, and erroneously appointed defendant Isabelle C. Koch, administratrix of the estate of Edward Cebrian, deceased, and issued letters of administration to her. Defendant Isabelle C. Koch, administratix of the estate of Edward Cebrian, deceased, immediately and wrongfully assumed possession and control of all of the property owned by said Edward Cebrian at the date of his death.

12. The aforementioned acts of the defendant, Isabelle C. Koch, have deprived the plaintiff and his predecessors in interest of knowledge of the existence of assets owned by Edward Cebrian and have deprived plaintiff and his predecessors of their right to file claims in the matter of the proper administration of the estate of Edward Cebrian, deceased.

13. The plaintiff's predecessors in interest did not learn of the aforementioned acts of fraudulent concealment and inter-meddling until after May 20, 1950.

Wherefore, plaintiff demands judgment against the defendant for the sum of $10,276.92 with interest at the rate of six percent per annum from November 15, 1932, compounded semi-annually, and costs.

TOWNSEND, TOWNSEND & HOPPE,
Of Counsel for Plaintiff.

/s/ CARL HOPPE,
Attorney for Plaintiff.

EXHIBIT A

$10,276.92——

San Francisco, California, November 15, 1932. Six Months After Date, for value received, I promise to pay to the order of John S. Barbee, of Lexington, Kentucky, the sum of Ten Thousand, Two Hundred Seventy-six and 92/100 dollars ($10,276.92), with interest at the rate of six per cent per annum from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full, this note negotiable and payable at 200 Trust Building, Lexington, Kentucky. The makers and endorsers of

this note and all parties hereto waive presentment thereof for payment, notice of non-payment, protest and notice of protest and dishonor, and diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, and I guarantee payment thereof in the hands of bona fide holders.

/s/ EDWARD CEBRIAN.

[Endorsed]: Filed November 6, 1952.

[Title of District Court and Cause.]

ANSWER

Comes Now defendant Isabelle C. Koch, individually and as Administratrix of the Estate of Edward Cebrian, alias, deceased, and in answer to the complaint of plaintiff, Charles J. Colville, on file herein, admits, denies and avers as follows:

I.

Defendant having no information or belief upon the allegation set forth in paragraph I of plaintiff's complaint that he is a citizen of the Dominion of Canada, sufficient to enable her to answer, denies such allegation. Defendant avers that she is a citizen of the United States of America and a resident of the City and County of San Francisco, State of California, and admits that the amount in controversy, exclusive of interest and costs, exceeds

Three Thousand Dollars ($3,000.00). Defendant avers that plaintiff is now and for several years immediately preceding the commencement of this action has been a resident of the County of Los Angeles, State of California, and is the owner of the real property at 10753 Lindbrook Drive, West Los Angeles, California, wherein he maintains his principal residence.

II.

Defendant having no information or belief upon the allegations set forth in paragraph 2 of plaintiff's complaint sufficient to enable her to answer, she denies each and every allegation therein contained, except that she admits that Edward Cebrian is now deceased.

III.

Defendant having no information or belief upon the allegations set forth in paragraph 3 of plaintiff's complaint sufficient to enable her to answer, denies that on or about May 15, 1933, or on any other date, John S. Barbee, or anyone else, assigned a promissory note of Edward Cebrian to Van Meter-Terrell Feed Company, a sole proprietorship, or that one Baylor Van Meter was the sole owner of said Van Meter-Terrell Feed Company. Defendant avers that the Van Meter-Terrell Feed Company was a Kentucky corporation and not a sole-proprietorship, as alleged in plaintiff's complaint.

IV.

Defendant having no information or belief upon the allegations of paragraph 4 of plaintiff's com-

plaint sufficient to enable her to answer, denies each and every and all and singular the allegations therein contained.

V.

Defendant having no information or belief upon the allegations of paragraph 5 of plaintiff's complaint sufficient to enable her to answer, denies each and every and all and singular the allegations therein contained. Defendant denies that First National Bank and Trust Company of Lexington, Kentucky, was the owner of the alleged promissory note of Edward Cebrian on May 24, 1950, or at any other time, or at all, either as executor or as trustee of the estate of Baylor Van Meter or in any other capacity. Defendant denies that plaintiff, Charles J. Colville, acquired any title or ownership by reason of any alleged or purported assignment to him by First National Bank and Trust Company of Lexington, Kentucky, or otherwise.

VI.

Defendant admits the allegations contained in paragraph 6, of the said complaint.

VII.

Denies that at the date of his death on June 6, 1944, or at any other time, Edward Cebrian owed to Baylor Van Meter the amount of the said note, Exhibit "A" attached to plaintiff's complaint, or any interest thereon. Denies that the amount of said note or any interest thereon in now due or owing to plaintiff. Defendant, having no infor-

mation or belief upon the allegation that no one has ever paid the amount of said note and interest to Baylor Van Meter or to his successors in title, sufficient to enable her to answer, denies said allegation. Defendant denies that Baylor Van Meter was ever the owner of said promissory note.

VIII.

Defendant denies that Edward Cebrian was a resident of the County of Los Angeles, State of California, at the time of his death, but avers that on the contrary, he was living in Los Angeles solely by reason of his employment with the Office of Censorship; that he had been raised in San Francisco; that he considered San Francisco as his home; that he frequently requested defendant to make further and larger advances to him to enable him to give up his employment in Los Angeles and return to San Francisco; that he maintained a room in the Cebrian family home at 1801 Octavia Street in the City and County of San Francisco, until it was sold following the death of Edward Cebrian's father, John C. Cebrian; that defendant, having advanced many thousands of dollars to her brother, Edward Cebrian, towards his support and in a fruitless attempt to preserve and recover his interest in Cuyama Rancho, was unable and unwilling to finance his return to San Francisco and undertake his full support; that when the family home at 1801 Octavia Street was transferred by Ralph Cebrian, brother of Edward Ce-

brian, Edward Cebrian requested that Ralph Cebrian remove Edward's personal effects and store them in his, Ralph's home in San Francisco until such time as Edward Cebrian could return to San Francisco and reestablish himself here; that Edward Cebrian asked defendant to locate a room or a small apartment in San Francisco for him, since he could not afford to resume his residence at the Palace Hotel, where he last resided in San Francisco, but that defendant was unable to find any quarters for him, due to the war time conditions of full occupancy.

IX.

Defendant denies that immediately after the death of Edward Cebrian, or at any other time, or at all, she wrongfully, or fraudulently intermeddled with the proper probate of the Estate of Edward Cebrian, or that she fraudulently or wrongfully obtained possession or control of the property or Estate of Edward Cebrian. Defendant avers that on February 9, 1945, she executed a petition for letters of administration of the Estate of Edward Cebrian, and caused said petition to be filed in the Superior Court of the State of California, in and for the City and County of San Francisco, on February 10, 1945, probate proceeding No. 98563. Defendant avers that on or about February 11, 1945, she caused notice of the hearing of her said petition for letters of administration to be given for the time and in the manner required by law and Section 441, of the Probate Code of the State of California. Defendant avers further

that she alleged in her said petition that Edward Cebrian died in the County of Los Angeles, State of California, but that he was at the time of his death a resident of the City and County of San Francisco, State of California. Defendant avers further that on February 25, 1945, the Superior Court of the State of California, in and for the City and County of San Francisco, found that Edward Cebrian had died and was a resident of the City and County of San Francisco, State of California, at the time of his death, and appointed defendant as administratrix of his estate; that at all times since February 25, 1945, defendant has retained possession and control of the real and personal property of the Estate of Edward Cebrian, deceased, solely by virtue of her fiduciary capacity as administratrix of the estate of said decedent, and not otherwise, and at all such times she has administered said estate, made sales and leases, paid allowed and compromised claims, under and pursuant to the orders of the Superior Court of the State of California, in and for the City and County of San Francisco, which has had exclusive jurisdiction of the Estate of Edward Cebrian, alias, deceased.

X.

Defendant admits that after filing a petition for letters of administration in the Superior Court of the State of California, in and for the City and County of San Francisco, and before any hearing was had upon said petition, she filed a petition for letters of administration in the Superior Court

of the State of California, in and for the County of Los Angeles, on February 20, 1945. Defendant avers she caused notice of the hearing of said Los Angeles petition to be given in the manner and for the time required by law and by Section 441 of the Probate Code of California. Defendant avers further that the only reason for filing said petition in Los Angeles County was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of the County of Los Angeles, rather than the City and County of San Francisco, as she alleged, and if so, it would necessarily follow that it would have decided it had no jurisdiction to appoint defendant as administratrix. In this event, defendant then could and would have proceeded with the probate proceedings instituted by her in Los Angeles County solely to meet that contingency. Howver, since on February 25, 1945, the San Francisco Superior Court determined that Edward Cebrian had been a resident of the City and County of San Francisco at the time of his death, and appointed defendant as his administratrix, it had and assumed exclusive jurisdiction of the probate administration of his estate and nothing either defendant or the Los Angeles Superior Court could have done would have given any force or vitality to the proceeding pending there. Accordingly, it was abandoned.

XI.

Defendant denies that she concealed, fraudulently or otherwise, the existence of the assets of the

said Edward Cebrian, or that she has intermeddled, fraudulently or otherwise, with the jurisdiction of the Los Angeles Superior Court over said assets; defendant avers in this connection that she has inventoried and accounted for all of the assets of the Edward Cebrian estate in the probate proceeding pending in the San Francisco Superior Court and that the Los Angeles Superior Court never had or acquired, nor does it now have, any jurisdiction over said assets. Defendant denies that the petition filed by defendant in San Francisco was a "second" petition, but avers that it was the first petition signed and filed. Defendant denies that her allegation in said San Francisco petition for letters of administration that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death was either false or fraudulent but avers that it was true and correct according to the best information and belief possessed by defendant then and now. Defendant denies that she knew in February, 1945, or at any other time, that Edward Cebrian was a resident of the County of Los Angeles at the time of his death. Defendant avers that such alleged Los Angeles residence was not the fact. Denies that defendant made false or fraudulent allegations of fact to the San Francisco Superior Court in her petition for probate or by any other pleading or evidence; denies that said San Francisco Superior Court relied upon any alleged false or fraudulent representations; denies that said San Francisco

Superior Court erred in appointing defendant as administratix of the Estate of Edward Cebrian, deceased. Defendant denies tht she ever wrongfully assumed possession or control of the property Edward Cebrian.

XII.

Denies that any acts of defendant have deprived plaintiff, or his predecessors in interest, of any knowledge of the existence of assets owned by Edward Cebrian, or have deprived plaintiff, or his predecessors, of their right to file claims in the matter of the Estate of Edward Cebrian, deceased, but on the contrary defendant alleges that plaintiff admitted to her in Los Angeles in November, 1950, that he had carefully examined all the public records pertaining to Edward Cebrian, including a petition in bankruptcy which Edward Cebrian had filed in 1934, the San Francisco probate proceedings, the Los Angeles petition for probate, the proceedings in a San Francisco Superior Court action entitled, Harting vs. Edward Cebrian, the official records of Santa Barbara County and other counties; that he claimed to be the owner of an old claim against Edward Cebrian but that he was going to use it as a wedge to reopen the old bankruptcy proceeding and enjoy the great wealth which had been realized through the Cuyama Valley oil discoveries in 1948. That these facts show that none of the actions of defendant, either alleged or admitted, had any effect whatsoever on either plaintiff or his predecessors, since they were

fully informed of all the facts, as alleged in his complaint. Plaintiff admitted further that he had enjoyed a great success in discovering flaws in title and using them as a basis for litigation and claims and he cited one instance whereby he had recovered a substantial sum from Shell Oil Company. In May, 1950, and prior to that time for all that appears from the complaint, plaintiff and his alleged predecessors in title had made no inquiry and were unaware of any actions or proceedings in connection with the Edward Cebrian estate and the probate thereof. However, defendant avers that plaintiff and his predecessors had constructive notice in 1945, of the petition for letters of administration filed and heard in San Francisco on February 25, 1945.

XII.

Defendant denies that neither plaintiff or his predecessors in title had any information prior to May, 1950, about the death of Edward Cebrian and the probate of his estate in San Francisco, but avers on the contrary that plaintiff had actual knowledge of these events and proceedings many months prior to May, 1950, and that he had in fact ordered and received photostat copies of the files, papers, records and proceedings in the matters of the estates of John C. Cebrian, deceased, father of Edward Cebrian, and of the matter of the estate of Edward Cebrian, deceased, prior to May, 1950. Defendant is informed and believes and, therefore, alleges that plaintiff had actual knowledge of the fact that Edward Cebrian had died in Los Angeles

on June 6, 1944, and that his estate was being probated in the City and County of San Francisco, State of California, more than three years prior to November 6, 1952, the date the complaint herein was filed.

XIII.

Defendant avers that the complaint of plaintiff fails to state a claim against defendant upon which relief can be granted.

And for a Second and Separate and Distinct Defense to plaintiff's cause of action, defendant alleges:

I.

That on February 26, 1945, she, as administratrix of the Estate of Edward Cebrian, alias, deceased, caused Notice to Creditors to be published in The Recorder, a newspaper of general circulation published in the City and County of San Francisco, State of California, in the matter of the Estate of Edward Cebrian, alias, deceased, probate proceeding No. 98563, for the time and in the manner provided by law and Section 700 of the Probate Code of California. That the six months period of time to file claims expired August 26, 1945. That no claim was ever filed or presented by plaintiff or any one else upon the promissory note of Edward Cebrian dated November 15, 1932, referred to in plaintiff's complaint, as required by the Probate Code of California.

And for a Third and Separate and Distinct Defense to plaintiff's alleged cause of action, defendant avers:

I.

That the plaintiff's alleged cause of action is barred by the provisions of Section 337(1) of the Code of Civil Procedure of the State of California.

II.

That the plaintiff's alleged cause of action is barred by the provisions of Section 361 of the Code of Civil Procedure of the State of California.

III.

That the plaintiff's alleged cause of action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

IV.

That the plaintiff's alleged cause of action is barred by the provisions of Section 338(4) of the Code of Civil Procedure of the State of California.

And for a Fourth and Separate and Distinct Defense to plaintiff's alleged cause of action, defendant avers.

I.

That plaintiff's alleged cause of action, in so far as it may seek or be intended to impress a constructive trust upon the assets of the Estate of Edward Cebrian, deceased, which are in custodia legis, is barred by laches in that plaintiff has ad-

mitted that he had knowledge of all the facts which he now claims entitle him to relief, almost two and one-half years before he brought this action. That such lack of diligence on the part of plaintiff and his predecessors in title to press his application for equitable relief has resulted in prejudice to defendant and other heirs of the Edward Cebrian estate, in that both the primary contracting parties are now dead, many personal records of the decedent, Edward Cebrian, have long since been lost or destroyed, and defendant is unable to verify or discover matters vital to her defenses, such as the presence or absence of a valid legal consideration for the note and the fact of payment by the defendant before he died, or any other circumstance, such as the possible merger of the note in a judgment obtained by any lawful holder thereof.

Wherefore, defendant prays that plaintiff take nothing by his complaint and that she be hence dismissed, with her costs.

/s/ CHARLES D. SOOY,
Attorney for Defendant.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 2, 1953.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT IN FAVOR OF DEFENDANT

This matter having been tried, briefed and submitted for decision,

The Court finds: That defendant-executrix, Isabelle C. Koch, committed no fraud extrinsic in character with respect to the probate proceedings involving the late Edward Cebrian. That there is no basis in law or in fact for directing the establishment of a constructive trust against said defendant and in favor of plaintiff, Wilma Urch Colville.

In view of the Court's specific finding on the issue of fraud, there is no occasion to pass upon the applicability of the statute of limitations or the defense of laches.

Accordingly, It is Ordered that judgment be entered in favor of defendant upon preparation of findings of fact and conclusions of law. Each side shall bear its own costs.

Dated: November 9, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed November 10, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 9th day of March, 1954, and continuing to and including the 11th day of March, 1954, before the Court, Honorable George B. Harris, United States District Judge, presiding, jury having been duly waived by the parties, Carl Hoppe, Esq., and Charles E. Townsend, Jr., Esq., appearing as attorneys for plaintiff, and Charles D. Sooy, Esq., appearing as attorney for defendant, and from the evidence introduced the Court finds the facts, as follows, to wit:

1. That Charles J. Colville, the original plaintiff herein, was at all times prior to his death a citizen of the Dominion of Canada, and that plaintiff by substitution, Wilma Urch Colville, is the widow, and executrix of the estate of Charles J. Colville, deceased, the original plaintiff herein;

2. That defendant is a citizen of the State of California;

3. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00);

4. That on November 15, 1932, one Edward Cebrian, now deceased, executed and delivered to the agents and attorneys of one John S. Barbee, or his assignee, Van Meter Terrell Feed Company, a Kentucky Corporation, a promissory note dated

November 15, 1932, whereby Edward Cebrian promised to pay to John S. Barbee, or his order, the sum of $10,276.92 with interest at six per cent per annum from date until paid, payable six months after the date thereof at 200 Trust Building, Lexington, Kentucky;

5. That a full, true and correct copy of the promissory note is as follows:

$10,276.92——

San Francisco, California, November 15, 1932.

Six Months After Date, for value received, I promise to pay to the order of John S. Barbee, of Lexington, Kentucky, the sum of Ten Thousand, Two Hundred Seventy-six and 92/100 dollars ($10,-276.92), with interest at the rate of six per cent, per annum from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full, this note negotiable and payable at 200 Trust Building, Lexington, Kentucky. The makers and endorsers of this note and all parties hereto waive presentment thereof for payment, notice of non-payment, protest and notice of protest and dishonor, and diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, and I guarantee payment thereof in the hands of bona fide holders.

/s/ EDWARD CEBRIAN.

6. That said promissory note dated November 15, 1932, was executed and delivered in renewal of an earlier promissory note from Edward Cebrian to John S. Barbee made in 1928 in Kentucky, which earlier note John S. Barbee had assigned to Van Meter Terrell Feed Company, a Kentucky Corporation, as collateral security for a debt owed by John S. Barbee to said corporation. Upon receipt in November, 1932, of the renewal note dated November 15, 1932, from Edward Cebrian to John S. Barbee, John S. Barbee endorsed said note in blank and delivered it to Van Meter Terrell Feed Company, a Kentucky Corporation;

7. That on or about June 6, 1945, Baylor Van-Meter sole owner of the said Van Meter Terrell Feed Company, a Kentucky Corporation, died at Lexington, Kentucky. On or about June 16, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed executor of his estate, and on or about August 24, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed trustee of the estate of Baylor Van-Meter, deceased;

8. That on or about May 24, 1950, said First National Bank and Trust Company of Lexington, Kentucky, delivered said note to Charles J. Colville, original plaintiff herein, and assigned to said Charles J. Colville all right, title, claim and interest it held in and to said promissory note dated November 15, 1932, from Edward Cebrian to John S. Barbee as executor or trustee of the estate of Baylor

Van-Meter, deceased, or as both executor and trustee of said estate;

9. That Edward Cebrian died on or about June 6, 1944, in the County of Los Angeles, State of California;

10. That at the time of his death, Edward Cebrian owed to John S. Barbee, Van Meter Terrell Feed Company, a Kentucky Corporation, or the assignee or assignees or successors of said John S. Barbee or said Corporation, the said note dated November 15, 1932, plus simple interest from said date at six per cent (6%) per annum;

11. That the Superior Court of the State of California, in and for the City and County of San Francisco, held that Edward Cebrian was at the time of his death a resident of the City and County of San Francisco, State of California, having lived most of his life in the Cebrian family home in San Francisco, although he died in the County of Los Angeles, where he had been living for about six (6) years because of his reduced financial circumstances and because of his opportunity for employment in Los Angeles County and for other reasons;

12. That on February 9, 1945, defendant executed a petition for letters of administration in the matter of the estate of Edward Cebrian, alias, deceased, and caused said petition to be filed on February 10, 1945, in the Superior Court of the State of California, in and for the City and County of

San Francisco, probate proceeding No. 98563 therein. On February 11, 1945, defendant caused notice of the hearing of said petition for letters of administration filed in San Francisco, to be given for the time and in the manner required by law and Section 441 of the Probate Code of the State of California. In her said petition for letters of administration, defendant alleged that Edward Cebrian had died in the County of Los Angeles, State of California, but that he was at the time of his death a resident of the City and County of San Francisco, State of California;

13. That on February 20, 1945, after filing a petition for letters of administration in the Superior Court of the State of California, in and for the City and County of San Francisco, and before any hearing was had upon said petition, defendant filed a petition for letters of administration in the Superior Court of the State of California, in and for the County of Los Angeles. Defendant caused notice of the hearing of said Los Angeles petition to be given in the manner and for the time required by law and by Section 441 of the Probate Code of California. The defendant's only reason for filing said petition in Los Angeles County was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of the County of Los Angeles, rather than of the City and County of San Francisco, as she alleged, and if so, it would necessarily follow that it

would have decided it had no jurisdiction to appoint defendant as administratrix. In this event, defendant then could and would have proceeded with the probate proceedings instituted by her in Los Angeles County solely to meet that contingency. However, on February 26, 1945, the San Francisco Superior Court determined that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and appointed defendant as his administratrix. Accordingly, defendant abandoned the Los Angeles proceeding;

14. At no time subsequent to the death of Edward Cebrian did defendant, as an individual or as administratrix of his estate, inter-meddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently;

15. That at no time subsequent to the death of Edward Cebrian, did defendant conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian; defendant has inventoried and accounted for all of the assets of the Edward Cebrian estate in the probate proceeding pending in the City and County of San Francisco; the allegations in the petition for letters of administration filed February 10, 1945, in the Superior Court in and for the City and Conuty of San Francisco, as to the legal residence of Edward Cebrian at the time of his death were true and correct according to the best information and belief of defendant;

16. That no acts of defendant have deprived

plaintiff, or her predecessors, of their right to file claims;

17. That on February 26, 1945, defendant, as administratrix of the estate of Edward Cebrian, alias, deceased, caused Notice to Creditors to be published in The Recorder, a newspaper of general circulation published in the City and County of San Francisco, State of California, in the matter of the estate of Edward Cebrian, alias, deceased, probate proceeding No. 98563, for the time and in the manner provided by law and Section 700 of the Probate Code of California; that the six-months period of time to file claims expired August 26, 1945; that no claim was ever filed or presented by plaintiff or any one else upon the promissory note of Edward Cebrian dated November 15, 1932, referred to in plaintiff's complaint, as required by the Probate Code of California;

18. That all of the facts alleged in plaintiff's Complaint inconsistent with the foregoing findings are untrue;

19. That all the facts alleged in defendant's Answer not inconsistent with the foregoing findings are true;

20. That no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian.

Conclusions of Law

As Conclusions of Law from the foregoing findings of fact the Court finds, as follows:

I.

That any suit or action to recover upon the promissory note dated November 15, 1932, made by Edward Cebrian in favor of John S. Barbee in the sum of $10,276.92, with interest, is forever barred by reason of the failure of the holder of said promissory note to file a creditor's claim in probate thereon within six months from the date of the first publication of Notice to Creditors on February 27, 1945, made in the matter of the estate of Edward Cebrian, alias, deceased, pending in the Superior Court of the State of California, in and for the City and County of San Francisco, probate file No. 98563 in the records thereof.

II.

That plaintiff and her predecessors in interest had constructive notice of the hearing on February 26, 1945, of the petition of defendant for letters of administration heard in the Superior Court of the State of California, in and for the City and County of San Francisco, by reason of the notice of said hearing given by defendant in the manner and for the time required by law.

III.

That the Superior Court of the State of California, in and for the County of Los Angeles, never had or acquired jurisdiction of the matter of the

estate of Edward Cebrian, alias, deceased, under the petition for letters of administration filed therein by defendant on February 20, 1945, by reason of the fact that the Superior Court of the State of California, in and for the City and County of San Francisco, in which the first petition for letters of administration was filed on February 10, 1945, had on February 26, 1945, determined that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death and that the jurisdiction to administer the estate of said decedent was in San Francisco Superior Court.

IV.

Defendant committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of Edward Cebrian, alias, deceased, either in the County of Los Angeles or the City and County of San Francisco, State of California.

V.

That plaintiff is not entitled by law or under the evidence adduced at the trial of this case to a judgment that defendant, either as administratrix of the estate of Edward Cebrian, alias, deceased, or as an individual, is a constructive trustee for plaintiff, Wilma Urch Colville.

VI.

The Court, having disposed of the case in favor of defendant by express findings of fact and conclusions of law on the issue of fraud, makes no findings of fact or conclusions of law on the issues as to the interpretation of the note in suit, the questions of

conflicts of laws or the other issues raised by defendant's special defenses based upon laches and various statutes of limitation of the States of California and Kentucky.

VII.

That defendant is entitled to judgment that plaintiff take nothing by her complaint, provided, however, each party shall bear her own costs of suit. Let Judgment be entered accordingly.

Dated: February 14, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed February 14, 1955.

In the United States District Court for the Northern District of California, Southern Division
Civil Action No. 32020

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Plaintiff,

vs.

ISABELLE C. KOCH, individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant.

JUDGMENT

This cause having come on regularly for trial on the 9th day of March, 1954, before the United States

District Court, Honorable George B. Harris, District Judge, presiding, without a jury, a jury having been duly waived; Carl Hoppe, Esq., and Charles E. Townsend, Jr., Esq., appearing as attorneys for plaintiff, and Charles D. Sooy, Esq., appearing as attorney for defendant; and the Court having made its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that plaintiff take nothing by her said complaint, and

It Is Ordered further that each party bear her own costs of suit incurred herein.

Dated: February 14, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Receipt of copy acknowledged.

Lodged November 18, 1954.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Wilma Urch Colville, Executrix of the last will and testament of Charles J. Colville, Deceased, plaintiff above named, hereby appeals to the United States Court of Appeals for

the Ninth Circuit from the final judgment entered in this action on February 15, 1955.

/s/ CARL HOPPE,
Attorney for Appellant.

[Endorsed]: Filed March 17, 1955.

The United States District Court, Northern District of California, Southern Division

No. 32020

WILMAN URCH COLVILLE, Executrix of the last Will and Testament of Charles J. Colville, Deceased,

Plaintiff,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Debrian, Deceased,

Defendant.

Before: Hon. George B. Harris, Judge.

TRANSCRIPT ON APPEAL

Appearances:

For the Plaintiff:
CARL HOPPE, ESQ., and
CHARLES E. TOWNSEND, JR., ESQ.

For the Defendant:
CHARLES D. SOOY, ESQ.

March 9, 1954, 10:00 A.M.

The Clerk: Colville vs. Koch on trial.

Mr. Hoppe: Ready, your Honor, for the Plaintiff.

Mr. Sooy: Ready for the Defendant. [3*]

* * *

Mr. Hoppe: * * * I would like to call your Honor's attention to a mis-statement made in paragraph 3 of the complaint, and as far as that is concerned, we adopt paragraph 3 of the Defendant's answer. We alleged the [4] Van Meter-Terrell Feed Company was a sole proprietorship and the Defendants pointed out it was a Kentucky corporation. We have investigated and have learned that we made a mistake, and at this time, in order to eliminate any controversy on that, I would like to make a motion to amend paragraph 3 of the complaint to read as follows:

"Thereafter said John S. Barbee signed said promissory note to Van Meter-Terrell Feed Company, a Kentucky corporation, and said Van Meter-Terrell Feed Company thereafter assigned said promissory note to one Baylor Van Meter of Lexington, Kentucky."

The Court: If there is no objection, then, the motion may be granted with respect to the amendment.

Mr. Sooy: No objection, and I take it our answer may be deemed a denial.

Mr. Hoppe: Certainly.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: So ordered. [5]

* * *

Mr. Hoppe: * * * We offer in evidence as Plaintiff's Exhibit 1 a note from Edward Cebrian to John S. Barbee dated November 15, 1932, in the amount of $10,276.92. [8]

* * *

Mr. Hoppe: * * * I should like to read a page and a half from Mr. Weldon's deposition. This deposition was taken on April 23, 1953, at Santa Barbara, California, and counsel for the Plaintiff and counsel for the Defendant were both present:

"Q. (By Mr. Hoppe): "Will you state your name, please.

"A. Hugh J. Weldon.

"Q. And you are an attorney in Santa Barbara?

"A. That is right.

"Q. And you at one time represented a John S. Barbee? A. That is right.

"Q. ——of Lexington, Kentucky?"

I then identified the document that is now in evidence as Plaintiff's Exhibit 1 and asked the following question:

> (The note referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

"Q. I hand you Plaintiff's Exhibit No. 1, and ask you whether you can identify it.

"A. Yes. That is the original of the promissory note for $10,276.92 dated San Francisco, California, November 15, 1932, purporting to be signed by Ed-

ward Cebrian. This note was prepared in my office, forwarded by mail to Edward Cebrian at his office in San Francisco, and received back by me in due course of mail in a letter purporting to be signed by him. [9]

"Q. Are you familiar with Mr. Cebrian's signature?

"A. Only by reference to his signature on other letters in my file which I have received from time to time from him, comparing the signature on the note with the signature on letters purporting to come from him and received by me in the mail from him.

"I should say that appears to be his signature, yes.

"Q. Upon receiving Plaintiff's deposition Exhibit No. 1, what did you do with it, Mr. Weldon?

"A. I delivered it to Heaney Price and Postel of this city, who were at that time representing locally Allen, Botts and Duncan.

"Q. Who is Allen, Botts and Duncan?

"A. They were a firm of attorneys in Lexington, Kentucky, who, from their correspondence, were the attorneys for Van Meter-Terrell Feed Company.

"Q. Now, have you ever had correspondence with John S. Barbee of Lexington, Kentucky?

"A. Yes, I have had, on many occasions.

"Q. And are you familiar with his signature from that correspondence?

"A. From his signature on letters purporting to come from him, yes.

"Q. Are you familiar with the signature that appears on the reverse side of Plaintiff's Exhibit 1? [10]

"A. Yes. I would say that, in comparing that with signatures on many letters which I received in the mail from Mr. Barbee, I would say that is his signature. I am not familiar with his signature otherwise than by receiving correspondence that I have had with him."

As Plaintiff's Exhibit 2 we offer in evidence a letter dated November 19, 1932, from Edward Cebrian to Hugh J. Weldon of San Francisco, purporting to mail the note.

The Court: It may be marked in evidence.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 3 we offer in evidence a receipt dated November 22, 1932, signed by Heaney, Price Postel.

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit No. 4 we offer in evidence a letter dated December 3, 1932, Lexington, Kentucky, from John S. Barbee to Hugh J. Weldon acknowledging receipt.

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 5 we offer in evidence a letter from Edward Cebrian to Hugh J. Weldon dated [11] December 8, 1932, acknowledging receipt of the notes for which this note was given as a renewal.

The Court: It may be marked.

* * *

Mr. Hoppe: Your Honor, the next document that we want to offer in evidence is a certificate of registration of Edward Cebrian down in the Cuyana Precinct in Santa Barbara County. The original certified copy of that, that is, the one that would technically be admissible in evidence under the rules, is part of the pleadings. Rather than take the pleadings apart I should like to offer in evidence a copy of that. Is that satisfactory?

Mr. Sooy: No objection.

Mr. Hoppe: As Plaintiff's Exhibit 6 we offer in evidence a certified copy of the notice as it appears on the Great Register of Santa Barbara showing that on July 13, 1936 Edward Cebrian was registered in Santa Barbara County.

The Court: It may be marked.

* * *

Mr. Hoppe: I should like to do a little reading from the deposition of Isabelle C. Koch, who is the defendant. She is ill, your Honor, and counsel has agreed that her deposition [12] could be taken, although technically she would not come under the rules, but we have agreed under that provision which permits us to do so. This deposition was taken on February 23, 1954:

"Q. What is your name, please?

"A. Isabelle Cebrian Koch.

"Q. What is your address?

"A. 2090 Pacific.

"Q. How long have you lived in San Francisco?

"A. On and off, you mean? Well, I was born in San Francisco; raised in San Francisco.

"Q. Was Edward Cebrian your brother?

"A. Yes, he was.

"Q. Are you the administratrix of this estate?

"A. Yes, sir, I am.

"Q. Were you appointed in February, 1945?

"A. Yes.

"Q. When did you brother pass away, Mrs. Koch? "A. 1944.

"Q. Was it in June of that year?

"A. Yes, it was."

For your information I was reading from page 3, Mr. Sooy. I now turn to page 19 of the deposition. Question by Mr. Hoppe.

"Q. Now, Mrs. Koch, to go back over the history of the various places that your brother lived, we will go back and start in 1935. Now, from 1935 to 1938, your brother lived at the Cuyana Rancho under the lease, isn't that right? A. Yes.

"Q. And while he was there you also lived there, did you not, you and your husband? A. Yes.

"Q. And did you and your husband vote down in—— A. I don't recall.

"Q. You do not recall? A. I don't recall.

"Q. Do you recall your brother voting in the elections down at Cuyana? A. I don't recall."

I go to page 20:

"Q. Now, in 1935, while you were living down at the ranch there and Edward was living down there, Edward at that time gave you a deed of his

interest in the new Caledonia Farms, did he not?

"A. He did."

Mr. Hoppe: At this time we offer in evidence as plaintiff's Exhibit 7, a certified copy of a deed dated March 21, 1935, from Edward Cebrian to Isabelle C. Koch of certain lands up in Yolo County.

The Court: It may be marked. [14]

* * *

"Q. He did?

"A. And I could not take care of it, so my sister took it up. I couldn't handle two things.

"Q. And so you deeded the property to your sister? A. To my sister."

Mr. Hoppe: At this time we offer in evidence as Plaintiff's Exhibit 8 a certified copy of the deed from Isabelle C. Koch to Josephine C. McCormick dated October 30, 1935, of the same lands up in Yolo County.

The Court: It may be marked.

* * *

Mr. Hoppe: I read from the deposition again.

"Q. Now, in 1938, after Edward Cebrian left the ranch, then he moved to Los Angeles, is that right? A. Yes.

"Q. Now, while you were living at the ranch down there your father died, did he not?

"A. He died, yes.

"Q. And he left the family homestead to Ralph Cebrian, didn't he? A. That's correct.

"Q. And then is it not true that while you were

still living down there that Ralph Cebrian sold the family home? While you and your brother were living at Cuyana did not your [15] Ralph sell the family homestead?

"A. I do not recall in what year he sold it. I do not remember.

"Q. To whom did he sell it? Do you recall that?

"A. I believe it was to Louis Cebrian, my brother's parents-in-laws.

"Q. Now, when you and your husband came back from Cuyana where did you and your family move? A. Fairmont Hotel.

"Q. And when you moved to the Fairmont Hotel, where was Ralph Cebrian living at that time?

"A. He was living on Bush Street, I believe.

"Q. He was living on Bush Street?

"A. Yes.

"Q. So that by the time that you had moved back here to the Fairmont Hotel, Ralph Cebrian had already left the family homestead, had he not?

"A. I believe so.

"Q. And when you came back to the Fairmont did Edward come up with you?

"A. He did not. He went to Los Angeles.

"Q. He went to Los Angeles? A. Yes."

Mr. Hoppe: As Plaintiff's Exhibit 9, we offer in evidence a certified copy of a deed from Ralph J. Cebrian to Louis deL. [16] Cebrian dated May 17, 1937.

The Court: It may be marked.

* * *

Mr. Hoppe: We do have much more of this, your Honor. It is the only way of doing it with these documents.

As Plaintiff's Exhibit 10 the Plaintiff offers in evidence a stipulation of facts entered into by the parties in August of 1953. The substance of this stipulation is that a party by the name of Minnie Melcher, if she were called to testify, would testify that she ran an apartment house down in Los Angeles; that on October 1, 1939, Edward Cebrian came there and he rented an apartment, and he promptly moved in with all of his belongings, and he stayed there until June 6, 1944, and that he told her it was his intention to become a permanent tenant, and that it was his intention to make the apartment his permanent home, and that when he moved in he took in his book cases, his books, his pictures, stamp collection and his clothing, and that he never left the premises in all the time he was living there until the date of his death.

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 11 Plaintiff offers [17] in evidence a certified copy of the affidavit of registration of Edward Cebrian as a voter in Los Angeles County, showing that he became a registered voter on March 20, 1940, that he removed from Cuyama in October 1938, and that he voted in the general elections of 1940 and 1942,

giving his address as 1549 Northwestern Avenue, which is the address in that stipulation.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 12, the Plaintiff offers in evidence a certified copy of the death certificate of Edward Cebrian, showing that he died on June 6, 1944, and that his usual residence was Los Angeles, 1549 Northwestern Avenue.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 13, the plaintiff offers in evidence a certified copy of the file in the Superior Court for the County of Los Angeles No. 240761, in the matter of the estate of Edward Cebrian. [18]

* * *

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 14, we offer in evidence a certified copy of the will of Baylor Van Meter, a certified copy of letters of administration to First National Bank and Trust Company of Lexington, Kentucky, and a certified copy of letters addressed to said bank. [19]

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 15, we offer in evidence a certified copy of a deed dated November 12, 1948, from Joseph C. McCormick to the estate of Edward Cebrian, deceased, transferring back this Yolo County property.

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 16, we offer in evidence a certified copy of a deed April 8, 1949, from Josephine C. McCormick to the heirs or devisees of Edward Cebrian also transferring this property back.

The Court: It may be marked.

* * *

Mr. Hoppe: As Plaintiff's Exhibit No. 17, we offer in evidence an assignment of debt and note executed by the First National Bank and Trust Company of Lexington, Kentucky, to Charles J. Colville, and as Plaintiff's Exhibit 17-A, we offer in evidence a copy of a letter dated May 20, 1950, referred to in the assignment. [20]

* * *

Mr. Hoppe: Your Honor, referring to the Los Angeles probate proceedings, which are plaintiff's Exhibit 13, changing the numbers, I would just like to read this question and answer from page 24, of Mrs. Koch's deposition. Question by Mr. Hoppe:

"Q. Mrs. Koch, I hand you Plaintiff's deposition Exhibit 1, for identification and ask you to look at it and tell us if you recall signing an original paper of which that appears to be a copy?

"A. Yes, I did sign it. That is my signature." [21]

* * *

WILMA URCH COLVILLE

the Plaintiff herein, called as a witness on her own behalf, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name and occupation, if any, for the Court?

The Witness: Wilma Urch Colville, 1229 Malcolm Avenue, Los Angeles.

The Clerk: Have you an occupation?

The Witness: No, just housewife.

Direct Examination

By Mr. Hoppe:

Q. Where were you born, Mrs. Colville.

A. In Canada, Toronto, Canada.

Q. What citizenship are you, Mrs. Colville?

A. I am a Canadian.

Q. Are you the widow of Charles J. Colville?

A. Yes.

Q. When were you and Mr. Colville married?

A. October, 1911.

Q. In what country? A. Canada.

Q. When did you come into this country?

A. 1918. I came in in September; he came in in February.

Q. At what port of entry did you come in? [22]

A. Mr. Colville came in at Buffalo and I came in at Niagra Falls.

Q. What citizenship was Mr. Colville when you

(Testimony of Wilma Urch Colville.)

came into this country? A. Canadian.

Q. Did Mr. Colville ever apply for American citizenship? A. He did right after he came in.

Q. Where was that? A. Buffalo.

Q. When was that? A. 1918.

Q. What happened to that application?

A. He was not in Buffalo when it came due, and so it lapsed.

Q. Have you gone through Mr. Colville's personal effects, and have you handed me some documents? A. Yes.

Mr. Hoppe: As Plaintiff's Exhibit 18, the Plaintiff offers in evidence the passport of Charles J. Colville up to and including page 9, thereof, the rest of the pages being blank, and we ask leave to withdraw the original of the passport and to have photostats made and substitute the photostats.

The Court: That may be the order.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 19, we offer in evidence [23] the alien registration receipt card No. 5540284, issued to Charles Julius Colville under the Alien Registration Act of 1940, and we ask leave to withdraw this and substitute a photostat.

The Court: So ordered.

* * *

Mr. Hoppe: As Plaintiff's Exhibit 20, we offer in evidence a resident alien's border crossing identification card dated July 14, 1949, and issued to

(Testimony of Wilma Urch Colville.)

Charles J. Colville, and likewise ask leave to withdraw it.

The Court: It is so ordered.

* * *

Q. (By Mr. Hoppe): Mrs. Colville, I hand you Plaintiff's Exhibit I, for identification and ask you if you can identify what that document is? I mean Plaintiff's Exhibit 1 in evidence.

A. This is not the note, is it?

Q. Do you remember——

A. I remember giving you that.

Q. Where did you find this document?

A. It was in the safe deposit box in the bank.

Q. Where was that bank located?

A. In Westwood. [24]

Q. And what did you do with this document?

A. I sent it to you.

Mr. Hoppe: There are no further questions. You may cross examine.

Cross-Examination

By Mr. Sooy:

Q. Mrs. Colville, did you ever apply for citizenship in the United States?

A. No, I did not.

Mr. Sooy: That is all.

Mr. Hoppe: Your Honor, the Plaintiff is ready to rest with the exception that we do not have the missing document in the deposition of Isabelle C. Koch, and we want to introduce one exhibit in

evidence and read some of the testimony that has to do with it. Maybe I think the best thing to do is to assign a number to it now and I will read the part of the transcript I want and maybe we can put the exhibit in when we get it.

The Court: That is agreeable.

(The file of the Superior Court of the City and County of San Francisco in Case No. 98563, was thereupon deemed marked Plaintiff's Exhibit 21, in evidence.) [25]

* * *

Mr. Hoppe: * * * we would like to read the following questions in evidence.

* * *

This is on page 24.

"Q. Now, when you went before the Superior Court Judge here in San Francisco—what did you say his name was? "A. Judge Fitzpatrick.

"Q. Judge Fitzpatrick. What did you tell Judge Fitzpatrick about the proceedings you had filed down in Los Angeles?

"A. I told him I had filed them in Los Angeles so that the court would decide which was his residence.

Q. Now, what were all of the facts that you told Judge Fitzpatrick to help him reach a decision?

"A. That he was born here in San Francisco; he went to school here in San Francisco, and then they went abroad also to [26] school, but his first

schooling he started here. When he came back to America he went to Berkeley to the University, and his family home was here; he always wanted to live here; he would take trips as we all did, and he would always come back home, and that this was his home. He was living temporarily in Los Angeles, because he was able to find a job in Los Angeles, whereas here he had not been able to find one. So I left it to the court to decide.

"Q. And that's the sum and substance of what you told Judge Fitzpatrick?

"A. That's about it.

"Q. Can you think of anything else that you told him? A. Not at this moment I don't.

"Q. Do you know if your lawyer has a transcript of the hearing that you had before Judge Fitzpatrick? A. I imagine so."

I would like to read from page 26 to page 27.

"Q. Now, what did you do with the personal belongings your brother had in his apartment down in Los Angeles? A. He gave them to me.

"Q. And what was the nature of the personal belongings he had down in Los Angeles?

"A. Books and family paintings, and that's about all.

"Q. Stamp collection?

"A. No. He probably sold it. [27]

"Q. And then you bought those personal belongings from Los Angeles up here when you cleaned out the apartment?

"A. I sold some of the books.

"Q. What were the natures of the paintings that he had?

"A. Paintings that were in the family home that were distributed after my father died. We each got a couple.

"Q. Old masters?

"A. Yes—supposed to be."

Mr. Hoppe: With that, and with the understanding that that file will go in, Plaintiff will rest, your Honor.

* * *

Mr. Sooy: Some weeks ago a written stipulation was prepared by myself in connection with certain exhibits to be attached to the Weldon deposition. [28]

* * *

Mr. Sooy: * * * The stipulation made between Mr. Hoppe and myself in part is as follows: It was a stipulation for an order, incidentally, that was signed yesterday by Judge Roche:

"Now, therefor, it is ordered that that certain file entitled 'Barbee vs. Cebrian' marked plaintiff's deposition Exhibit No. 2, in connection with the deposition of Hugh J. Weldon, Esq., taken by Plaintiff on April 23, 1953, which file is now in the possession of the clerk of this court, may be removed by either Carl Hoppe, Esq., attorney for Plaintiff, or Charles D. Sooy, Esq., attorney for Defendant, from the office of the clerk for the purpose of having photographs or photostats made, in triplicate, of each of those certain 23 letters

and documents now contained in said file, which are hereinafter more particularly described, whereupon said file shall be returned to the clerk of this court.

"It is further ordered that one of said sets of copies of 23 letters and documents shall be attached to and deemed exhibits to the original deposition of Hugh J. Weldon, Esq., taken in Santa Barbara, California, on April 23, 1953, and that [29] the remaining two sets be delivered to counsel for the respective parties hereto."

* * *

In order to save time and the extended reading of depositions I now offer the deposition of Hugh Weldon and Isabelle C. Koch and the exhibits which were offered in evidence in connection with those depositions, including the 23 letters to which I referred, to be introduced in evidence.

Mr. Hoppe: Your Honor, we object to a blanket offer of that type because these depositions in part were taken for discovery purposes. Much is not admissible in evidence, and we have objections that we would make to various portions. I had not anticipated a blanket offer of this type. [30]

* * *

The Court: I would make this suggestion, Counsel, that the depositions and the exhibits be received by the court subject to your specific objection to any part thereof or the whole thereof, reserving unto yourself the right and opportunity to present

that objection either in writing or orally at an appropriate time.

Mr. Hoppe: That is agreeable to me. [31]

* * *

RALPH CEBRIAN

called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. Ralph J. Cebrian, 2111 Franklin Street; retired.

Direct Examination

By Mr. Sooy:

Q. How long have you lived in San Francisco, Mr. Cebrian? A. Practically all my life.

Q. Are you a brother of Edward Cebrian?

A. Yes, sir.

Q. Where was Edward born?

A. In San Francisco.

Q. Were you also born in San Francisco?

A. Yes, sir, I was.

Q. Were you younger or older than your brother? A. Younger. [33]

Q. By what margin sir? How many years?

A. Oh five or six years.

Q. Is your mother deceased? A. Yes.

Q. When did she pass away? A. 1920.

Q. Is your father deceased? A. Yes, sir.

(Testimony of Ralph Cebrian.)

Q. When did he pass away? A. 1935.

Q. Where did your father pass away?

A. In Madrid Spain.

Q. Was he staying there at that time?

A. He was, yes.

Q. At the time of his death in 1935, did he own a home in San Francisco?

A. He did.

Q. Where was that home?

A. 1801 Octavia Street.

Q. Were you living in that home at the time of his death? A. I was.

Q. Did your brother Edward Cebrian maintain an apartment in that home at that time?

A. He did.

Q. Were any of his personal belongings in that home? [34]

A. Yes.

Q. Did they remain there at all times while that home remained in the Cebrian family?

A. Yes, sir.

Q. Will you state to the Court what the extent of his apartment was?

A. He has two rooms, his own rooms on the main floor, and a camera room, we called it. He was very much interested in photography, and a very elaborate camera room with all his lenses, cameras, and so forth—three rooms which were exclusively his.

Q. What happened to the home after your father passed away?

(Testimony of Ralph Cebrian.)

A. He bequeathed the home to me, and I was forced to sell it to satisfy an obligation.

Q. When did you move out of the home?

A. In 1938, March 19th, 1938.

Q. How do you happen to remember that date, Mr. Cebrian?

A. March 19th is the calendar St. Joseph's Day, and in Spain St. Joseph's Day is like St. Patrick's Day in Ireland. It is a big day, and my mother's name, second name, was Josephine and we always had a big celebration on that day. So that date is in my mind.

Q. Did you execute a conveyance of that home to your brother Louie?

A. I did, yes, sir. [35]

Q. Was that a settlement of a family obligation, a debt from you to Louie?

A. That is right.

Q. Who was actually living in the home at the time your father passed away?

A. Myself, my brother; the two of us.

Q. Which brother are you referring to?

A. My brother Edward.

Q. How long did your brother Edward continue to live in the family home with you?

A. Well, right practically until—in fact, until the day I moved out. He moved out a few days later.

Q. Did he spend some time at the Cuyana Rancho in Santa Barbara County?

A. Yes, sir.

(Testimony of Ralph Cebrian.)

Q. When did your brother Louis dispose of the home at 1801 Octavia, if you know?

A. Almost as soon as I moved out, as I understand it.

Q. What happened to Edward's belongings when you moved out, Mr. Cebrian?

A. Well, I moved out and they remained there, and a few days later he went through the home and removed them himself.

Q. You know that of your own knowledge?

A. Absolutely.

Q. Do you know what he did with his belongings at that time? [36]

A. No, I couldn't say. I think that Bekins Moving and Storage moved them for him.

Q. When did you and your brother Edward last meet, Mr. Cebrian?

A. In the fall of 1938.

Q. Where was he staying at that time, or living? A. At the Palace Hotel.

Q. In San Francisco?

A. San Francisco.

Q. Where did you meet?

A. On First Street.

Q. Who was present?

A. Opposite my home then. I had moved from the residence to the small apartment on Bush Street and he was coming to visit me, and I was just coming home and we talked on the sidewalk.

Q. Who else was present then?

A. Just the two of us.

(Testimony of Ralph Cebrian.)

Q. Will you please tell the Court the conversation you had with your brother Edward at that time?

A. Yes. My brother Edward had come to see me and told me that our sister Isabelle wanted him to move down to Los Angeles.

The Court: His sister Isabelle?

A. Isabelle Koch, and she told him if he moved down there she would do the best to help him live, and so forth, and he [37] came to me to ask me to intercede with my sister and ask her because he wanted to remain in San Francisco. I advised him that I thought the best thing for him to do was to accede to her request and perhaps the family could work it out so he could return to San Francisco.

Q. Did he tell you he wished to remain in San Francisco? A. Yes, indeed.

* * *

Q. Did you ever visit your brother Edward Cebrian at the Cuyana Ranch?

A. I did not, no.

Q. Did you ever visit him in Los Angeles?

A. No, sir.

Q. Did you and your brother correspond between 1938 and 1944, [38] the date of his death?

A. No, sir.

Q. Not at all?

A. Not at all. My brother did not write letters. In his office, if he had somebody to dictate a letter

(Testimony of Ralph Cebrian.)

to, that was one thing, but he himself wrote very little, very sparingly.

Q. Do you know of your own knowledge his dealings with the Hibernia Bank in connection with the Cuyana Ranch? A. No, I do not.

Q. You know but not of your own knowledge?

A. Not of my own knowledge.

Q. Do you know where your brother lived in Los Angeles? A. No. [39]

* * *

Q. Was there any feeling at all between your brother and yourself?

A. No, your Honor. It was just a matter that we did not write. But when he was in San Francisco we lived together. We had our office together for many, many years, and we were in business together, and absolutely the closest probably——

Q. What was your business here, Mr. Cebrian?

A. We owned this ranch, the Cuyama Ranch, and we ran the ranch. I was mostly in San Francisco, in the office, and go down to the ranch, and so forth, on cattle business.

Q. Cattle and breeding horses?

A. No, the breeding of horses he had in Kentucky. I was not interested in the breeding of horses.

Q. Cuyama Ranch was in San Diego?

A. Santa Barbara and San Luis Obispo Counties.

Q. How extensive?

A. 44,000 acres plus, a little over.

(Testimony of Ralph Cebrian.)

Q. Was it an old ranch?

A. An old Spanish Ranch.

Q. An old grant?

A. An old grant, and our troubles came because we had a [40] mortgage, and a very large mortgage with the Hibernia Bank, and its business didn't pay. We couldn't meet the payments. So that is what started our troubles. He lost the ranch finally to the Hibernia Bank.

Q. Not unlike the story of many early Californians.

A. Yes, unfortunately yes, your Honor.

Q. (By Mr. Sooy): When did your brother Edward lose title to the ranch, Mr. Cebrian?

A. I guess it was around 1937 or 1938, as I remember now.

Q. Do you know what his rights were in connection with the ranch between 1935 and 1938?

A. I know he had an arrangement with the bank that he could buy back—he could get it back under lease, but I do not know the details, really.

Q. You, however, were one of the parties who signed this stipulation for a compromise in his debtor proceeding, are you not?

A. I imagine so, yes.

Q. You know generally the terms of that agreement were, as you stated, he had a lease with a three year option?

A. Yes, of course, it was so long ago I don't remember the details.

(Testimony of Ralph Cebrian.)

Q. Did he at any time regain title or interest in the Cuyama Rancho after 1938?

A. He did not. [41]

Q. Did he attempt to?

A. He did. Yes, he attempted to.

Q. In 1938, after he lost his rights in the Cuyama Ranch, what other resources did your brother Edward have?

A. Well, he had nothing.

Q. In 1935 prior to his making a deed to Mrs. Koch of his interest in Caledonia, what resources did he have at that time?

A. This property in Yolo County, he owned half of it and I owned half of it, but we had gotten into financial difficulties and had not paid the taxes for five years on it. We were ready to lose that property for taxes, and in 1935 I thought—the property had been in the family for many, many years. It is in the reclamation district 900—it was at that time—and my father had paid all of these big investments. The property did not pay. It was agricultural. And I thought we ought to keep it in the family. So I talked to my brother and we both decided that if the sisters wanted to take it over and pay the taxes, buy the property back from the treasurer of Yolo County, then we would be glad to deed it over to them.

The Court: You speak of the sister—that is the sister Isabelle?

A. Isabelle and Josephine McCormick. So I deeded my half share to Josephine McCormick and

(Testimony of Ralph Cebrian.)

Edward deeded his share to Isabelle Koch. Then my sister Josephine McCormick paid up all the back taxes and, of course, the property went into the two [42] names, the two sister's names. Then she went to Isabelle Koch and asked her, "Now, you pay half. I advanced so much money. I forget what it was, interest and all, and you owe me half of this."

Then Isabelle—she didn't decide. She wasn't able to take care of my brother Edward in Los Angeles, and what she had done to save the ranch, the Cuyama Ranch, and so forth, so she told my sister, "I can't take all these burdens. If you want to take it up, all right."

Then Isabelle Koch deeded her interest to Josephine McCormick, and Josephine McCormick held the property until 1944. [43]

* * *

The Court: Were these conversations part and parcel of the conversations between the four of you?

A. Yes, your Honor.

Q. They were not disjointed conversations, fragmentary in character?

A. No, your Honor.

* * *

Q. (By Mr. Sooy): Mr. Cebrian, was there a bonded indebtedness against the property?

A. Yes.

Q. That was an old Yolo reclamation?

(Testimony of Ralph Cebrian.)

A. Yes, District 900. [44]

* * *

The Witness: Today the bonds are all paid up. At that time they were not.

Q. (By Mr. Sooy): Were the bonds in default at that time?

A. Yes, the bonds had been in default, yes.

Q. Mr. Cebrian, at the time you and your brother made these prospective deeds, did the Caledonia Farms have a market value over and above this indebtedness to which you have referred?

A. No——

Mr. Hoppe: What time is this?

Mr. Sooy: At the time of the deeds in March of 1935.

The Witness: In 1935 everything was in depression. You could not sell the property. The obligations against it, the reclamation tax and maintenance tax—nobody would buy the property. There was no sale.

Q. Did you and your brother attempt to sell the property and realize an equity? A. We did.

Q. Were you unsuccessful in that regard?

A. We were not.

Q. Were you unsuccessful?

A. Unsuccessful, yes, sir.

Q. Were the local, state and county taxes delinquent for approximately five years?

A. That is right.

Q. Were you apprehensive of losing title through a tax sale? [45]

(Testimony of Ralph Cebrian.)

A. Yes, but we knew we were going to lose it. That is the reason I asked my sister, Mrs. McCormick, to take it over for those taxes. I am talking for myself now. My deed to her was just a matter to facilitate the thing, because she could have gone and bought it from the tax collector straight. So I deeded my share to her and she paid the back taxes. So in actual fact she was buying it from the Treasurer of Yolo County for those taxes.

Q. Mr. Cebrian, is your sister Josephine McCormick living? A. No, she died.

Q. Is her husband alive? A. No, he died.

Q. He predeceased her? A. He did.

Q. At the time you and your brother made these deeds to your two sisters, was there any discussion whatsoever about a trust or they would hold the property for your benefit?

A. Absolutely not.

Q. Did your sister tell you that as soon as values went up she would deed the property back to you?

A. No, sir.

Q. When if ever did you first learn that she had declared a trust in this property for your benefit?

A. In 1944 after my brother Edward's death.

Q. Do you know that your sister filed certain claims in [46] connection with Edward's estate?

A. Yes, sir.

Q. Do you recall that one of those claims was for the difference between the income taxes she had

(Testimony of Ralph Cebrian.)

paid on her general income and the income taxes she had paid on the Caledonia Farms?

A. Yes.

The Court: Was there ever a declaration of trust made?

Mr. Sooy: No, your Honor, to answer your question specifically. This trust came into existence, according to a claim filed by Mrs. McCormick, and it is the only time and place when this trust was reduced to writing. It arose, as near as I can tell, in 1940, because prior to that time Mrs. McCormick had collected the income, paid the taxes, paid the debts, and had reported the income from Caledonia Farms as her own income for each of the years from 1935 to 1939.

In 1940, for reasons which we can only surmise, she created this trust, although at that time she did not disclose it either to her brother Edward or her brother Ralph, but it was simply an accounting division between the income of her husband and herself and the income from Caledonia Farms. She filed independent returns of income for that property.

Then when Edward's estate was probated, after Edward died, she disclosed to her brother Ralph Cebrian and her sister Mrs. Koch that she had set up this trust because she was being [47] penalized for high income taxes on her own account, and that she had constituted herself approximately in 1940 as a trustee for her brothers. However, at no time was there any relationship back to the date of these

(Testimony of Ralph Cebrian.)

deeds. I think there will be some evidence on that subject.

The Court: Was that practice as engaged in affirmed by the Treasury Department in connection with the accounting practice?

Mr. Sooy: I have no personal knowledge. So far as we know, that situation prevailed, because she filed a claim, of having paid excessive taxes from 1935 to 1939.

The Court: She filed a claim against the estate of Isabelle, and that, I assume, was allowed?

Mr. Sooy: It was allowed and paid.

The Court: Was there any discussion during the course of these negotiations looking toward either the establishment of a trust or the conveyance of the property in question to your two sisters as a result of the joint operation of the deed on the part of yourself and your deceased brother? Were there any discussions concerning the existence of an obligation on the part of your deceased brother arising out of the note which is now the subject of this suit?

The Witness: No, your Honor. I never discussed that note.

The Court: Did you know of the existence of that?

A. No, I do not know of it. [48]

Q. When did you first learn of the existence of it?

A. Recently when this thing started. I didn't know about it until now.

(Testimony of Ralph Cebrian.)

Q. (By Mr. Sooy): Mr. Cebrian, after the initial deeds were made in March of 1935, were subsequent conveyances made by yourself and your brother, Mrs. Koch and her husband, to Mrs. McCormick?

A. I just deeded the one time. In 1935 I deeded my half, and it was clear. She bought the property and that was that. I didn't have any more exchange of deeds with her.

Q. When did you close up the office which you and your brother maintained here?

A. In 1935, as close as I can remember.

Q. How old was your brother when he died, Mr. Cebrian? A. 62.

Q. Where was your brother living at the time you had the conversation with him on Bush Street in 1938?

A. At the Palace Hotel in San Francisco.

Q. Do you recall receiving a communication at your brother's office from your brother Edward Cebrian in Kentucky regarding his registration for the census.

A. Yes, I recall that very plainly. In 1930 he was in Kentucky, and he couldn't be here when the census was being taken, and he wrote a letter to the office asking—saying he would not register in Kentucky but he wanted us to register [49] him in San Francisco.

Q. That was for the census?

A. The census.

Q. Do you still have that office?

(Testimony of Ralph Cebrian.)

A. No, sir.

Q. Where was that letter kept?

A. When we gave up the office most of the files were taken to Octavia Street, my residence. When I disposed of the residence they were destroyed. We couldn't keep it all, had no room for it, no place to keep it.

Q. You do not now have that letter?

A. No, I have no correspondence from the office at all. [50]

* * *

Mr. Hoppe: I certainly will, your Honor.

The Court: When and under what circumstances, Mr. Cebrian, was there a reconveyance made to you of the Yolo properties?

A. In 1944 when my sister told me she had created this trust——

Q. Was this Josephine?

A. Josephine McCormick—she showed me what she had advanced, all these taxes, and so forth. She presented a bill for that, we might say, and I paid her then for my share one half of those amounts with interest at five per cent, and she reconveyed the property to me.

Q. Was it an undivided one half interest?

A. Yes, your Honor.

Q. What became of the undivided one half interest?

Mr. Sooy: One half went to Mr. Cebrian and one half went to his brother's estate.

The Court: One half went to the estate?

(Testimony of Ralph Cebrian.)

Mr. Sooy: Yes. Those deeds to the heirs are in evidence. [51]

The Court: And then the heirs at laws of the late Mr. Cebrian succeeded to the property in question as a result of probate proceedings.

Mr. Sooy: That is right. I might point out that conveyance was not made until several years after Edward died until a number of claims were paid.

The Witness: Oh, yes. I did not mean to say in 1944 the reconveyance was made. It was later. It was 1948 or 1949. It was four or five years later, because I didn't have the money. If I had been able to purchase—if I had had that money then, I would have done so at the time, but it remained under the trust until I was able to buy my share and also the estate.

The Court: You might work out the chronology of that probate proceeding in some fashion so I will have it before me. Was statutory notice to creditors given?

Mr. Sooy: Oh, yes. This estate is still open. We have been active all these years in selling property and paying claims.

The Court: Of what did the assets of the estate consist?

Mr. Sooy: At the time of the death it consisted of 80 acres adjoining the Cuyana Rancho.

The Court: Free and clear, was it?

Mr. Sooy: It was free and clear. For some rea-

(Testimony of Ralph Cebrian.)

son it did not get under the mortgage to the Hibernia Bank. [52]

The Witness: The taxes were not paid on those 80 acres, either. The taxes were delinquent, the same as in Caledonia.

Mr. Sooy: That land, it is our contention, was absolutely valueless until oil was discovered in the Cuyama Valley in 1948, and the other interest was the one half beneficial interest in the Caledonia Farms.

The Court: What was the appraised value of the land in the inventory of this estate?

Mr. Sooy: $112,000.

The Court: Prior to the discovery of oil?

Mr. Sooy: Oh, $200 was the value of Cuyama, and all the rest of that was the value of Caledonia.

The Court: And oil has since been discovered. That is in the Cuyama Valley?

Mr. Sooy: Yes, oil has been discovered but not on this particular property, unfortunately.

The Witness: Your Honor, oil has been discovered in the Cuyama Valley and on this 80 acres there have been two dry holes, two dusters. [53]

* * *

Direct Examination
(Continued)

Q. (By Mr. Sooy): Mr. Cebrian, were there in any paintings in your father's estate?

A. Yes, sir.

(Testimony of Ralph Cebrian.)

Q. Were those bequeathed to his sons and daughters? A. Yes, sir.

Q. Did your brother Edwin Cebrian receive any of those paintings? A. He did.

Q. Do you know how many?

A. Two of them.

Q. Were the paintings which Edwin Cebrian received old masters, do you know?

A. Well, in the family we considered them old masters.

Q. Were they ever appraised by art collectors?

A. No, sir. [54]

Q. Do you know what the paintings were appraised for in your father's estate?

A. Very small amounts—$25, $30, and I think the highest was $50.

Q. Mr. Cebrian, did you ever meet Mr. Charles J. Colville, the plaintiff in this action?

A. Yes, I did.

Q. When did you meet him?

A. I met him in October, 1950, in Los Angeles.

Q. Do you remember the date?

A. The twelfth.

Q. Where did this meeting take place?

A. At the Biltmore Hotel.

Q. Who was present?

A. Myself, I. Lee Burch and Mr. Colville.

Q. No one else, just the three of you?

A. Just the three of us.

Q. Did you have a conversation with Mr. Colville at that time? A. I did.

(Testimony of Ralph Cebrian.)

Q. Will you tell the Court, please, what conversation was held at that time between you?

Mr. Hoppe: Will you tell us who said what and what you said, the exact words as well as you can remember it?

The Witness: I will try to, sir. I had been down [55] to Los Angeles over the holiday of the 12th, Columbus Day. I was down there with my wife and a nephew of hers. We had been to Europe, and this man came back with us. He was going to attend school in San Francisco to learn English.

Mr. Hoppe: Please the Court, we move to strike that. I would like the conversation to be the conversation that existed between the parties rather than what this witness was doing there.

Mr. Sooy: He is explaining the circumstances of being there.

The Court: It is a preliminary observation. It can't possibly do anyone any harm.

Q. (By Mr. Sooy): Will you state the conversation, Mr. Cebrian, that you had with Mr. Colville at that time?

A. We were in the room and Mr. Colville told me that he was a searcher of records, and that he had searched the records of the proceedings that my brother Edward had gone through in the Frazer—under the Frazer-Lemke Bill, and that he had a stack of records.

Mr. Lee Burch interrupted and said, "Ralph, that is why I wanted to take you to Mr. Colville's house,

(Testimony of Ralph Cebrian.)

so you would see these records that he has got from this hearing, and so forth."

I answered, why, I had no business going to Mr. Colville's [56] house. I have no interest in going there and I believe he had all these records.

Mr. Colville then he was a searcher of records. He pulled out of his pocket a photostatic copy of a check in six figures. He did not hand it to me. He *waived* it and said it was from the Shell Company. They had paid it. He used a profane phrase, saying, "That is why they wanted me."

And he said, "There are going to be others to join in that parade." I just listened. He never asked me to join him or anything like that. I think he was trying to draw me out.

And then he told me that in searching the records he had gone to Kentucky and found this note that he bought from the bank in Kentucky. This note had been written off by the bank as a loss, and that he had paid $500 for the note and had an agreement with them that he would like to have half of what he could get back on the note when he collected it.

And then he told me, he said, "Mr. Cebrian, if you try to pay this note now, or offer to buy this note from me now," he said, "I will walk out the door." That is the sum and substance of what was said.

Q. Did Mr. Colville say whether or not he had examined the pleadings in the Los Angeles Probate Proceeding? [57]

(Testimony of Ralph Cebrian.)

A. Yes, he said he had examined them and that he had searched all of those records and got all this evidence that he had, and, well, he was going to upset that and for his own profit he would get the ranch back.

Q. Do you recall whether or not Mr. Colville told you at that time that he had also searched the records in the San Francisco Probate Proceeding in connection with your brother's estate?

A. Yes, he mentioned he searched high and low, everything connected with this proceeding.

Q. Do you recall whether or not he said he had also looked at the records or your father's estate here in San Francisco?

A. Yes, he told me that, and not only that, he told me he had come to San Francisco and he knew where I lived, he had seen the house; he searched every place and found out everything to his satisfaction, and he was going to upset the proceedings.

Q. Did he tell you how long he had been searching these records?

A. I don't remember that he did, but he did tell me that he had been searching them, that he employed, I suppose, attorneys or other searchers. He did tell me that.

Q. Did he tell you what his plans were in connection with the Cebrian family and its affairs [58]

A. No, sir, not to me.

Mr. Sooy: Cross-examine.

* * *

(Testimony of Ralph Cebrian.)

Cross-Examination

By Mr. Hoppe:

Q. Mr. Cebrian, I would like to take your mind back to 1932, 1933 and 1934, that general era. At that time you and your brother Edward owned the Caledonia Farms together, is that right?

A. Yes, sir. We owned it from March, 1930. My father made a present of it to my brother Edward and myself.

Q. And that farm had been in the family for many years?

A. Since 1919. I think my father bought it in 1918 or 1919 around in there. [59]

* * *

Q. (By Mr. Hoppe): Did you know at the time you owned that property that your brother Edward had executed the note to Mr. Barbee in 1932?

A. No, sir, I heard of the note just now.

Q. Was the first time the first time you had any knowledge whatsoever of that note?

A. Yes, sir.

Q. In 1932—I know nothing about the value of farm lands—what was that property worth about in 1932?

A. I can only guess at that. I don't know.

Q. You have no opinion? A. No, sir.

Q. Were farm lands in 1932 in the Sacramento Valley at the low ebb in the depression as they were in other parts of the country or do you know that?

(Testimony of Ralph Cebrian.)

A. I imagine they were. It was a [60] depression.

Q. Do you recall that in 1934, on August 20th, that your brother Edward filed proceedings under the Frazer-Lemke Act?

A. I know he filed under that act, yes.

Q. Did you become a party to those proceedings?

A. I did not.

Q. Did you file a claim in those proceedings?

A. No, sir.

Q. Did you file a claim of any character whatsoever? A. No, sir.

Q. Did you sign any papers in that proceeding?

A. I don't recall signing any papers. I do not see that I would have to. I was not a party to them.

Mr. Hoppe: At this time, Your Honor, I have this voluminous file. I am not going to offer it in evidence. I am going to offer certain pages in evidence. But I would like to have this identified as plaintiff's exhibit next in order. The document is a certified copy of the complete file in the matter of Edward Cebrian, Bankruptcy Case No. 23755-C, as of March 3rd, 1951.

* * *

The Court: Mark it for identification.

(Whereupon file referred to above was marked Plaintiff's Exhibit No. 22 for [61] identification only.)

Q. (By Mr. Hoppe): Mr. Cebrian, I call your

(Testimony of Ralph Cebrian.)

attention to a document numbered 39 in these proceedings, entitled "Proof of Death and Letter of Attorney——"

A. Is that the estate of my father?

Q. This is the bankruptcy estate?

A. Oh.

Q. And I ask you if that is your signature?

A. Yes, that is my signature. May I know what the document is, please?

Q. Yes. We will look at the document now and see if it refreshes your recollection that you did file some papers.

A. Undoubtedly I did. I didn't remember this. This was from my father's estate, that my brother owed the estate $80,000. Is that the document?

Q. I believe it is $34,192 plus $1,168.77.

A. Yes. That I remember now, perfectly. I certainly did. My brother owed my father's estate that money, and that had to go into those proceedings, and so it was done legally and my attorney advised me to sign and I did.

Q. Did you sign any other papers in that estate?

A. I don't remember; It is so many years ago I don't remember. If you show them to me I will tell you whether I signed them or not.

Q. I call your attention to a document numbered 46 in [62] this volume.

A. That is my signature, signed also. That is when I was attorney in fact for my father in San Francisco and I signed this in that connection. What is this document, please?

(Testimony of Ralph Cebrian.)

Q. This is a certified copy of the entire file in those proceedings.

A. That particular document that I signed——

Q. That particular document was the stipulation dismissing the bankruptcy proceedings. Take a look at it and see if it refreshes your recollection.

A. $450,000 paid to the bank, so forth.

Mr. Hoppe: If it please the Court, the plaintiff offers in evidence at this time the following pages from plaintiff's Exhibit 22 for identification. We offer in evidence the petition of the debtor farmer in proceedings under Section 75 of the Bankruptcy Act, consisting of two pages.

We offer in evidence Page 1 of Schedule A listing the taxes which were payable against this Yolo County property at that time.

We offer in evidence the page entitled "Creditors Holding Securities," showing the amount of the reclamation district charge against the Caledonia property.

We offer in evidence Schedule A (3), creditors whose [63] claims are unsecured, showing the date, note to John Barbee, Lexington, Kentucky, dated November 15, 1932.

We offer in evidence the oath to schedule A, signed by Edward Cebrian.

We offer in evidence a statement of all property of bankrupt, Schedule B (1) real estate, listing the value of the half interest in the Yolo County property at $55,000.

(Testimony of Ralph Cebrian.)

We offer in evidence the oath to schedule B and ask leave to take photostats so that the original will not encumber the record.

We also offer in evidence the claim which the witness has just identified, "The Proof of Death and Letter of Attorney," which is marked Document 39, comprising seven pages, and ask that we be permitted leave to withdraw the document and take photostats and substitute them in lieu of the originals.

And we offer in evidence a stipulation for an order confirming the plan of settlement and for order of dismissal, Document 46, consisting of three pages, and ask leave to withdraw them and put in the originals. I mean put them in place of the originals. [64]

* * *

The Court: The documents may be marked.

(Whereupon the documents referred to above were marked Plaintiff's Exhibits 22-A to 22-I, inclusive, and respectively, in Evidence.)

Q. (By Mr. Hoppe): Mr. Cebrian, you recall that in January, pursuant to that stipulation that you and your brother entered into, that the Frazer-Lemke proceedings were dismissed, is that right?

A. Yes.

Q. Following that, you and your brother continued to own the Caledonia Farms until you transferred title to your sister, is that right?

A. Yes. [65]

* * *

(Testimony of Ralph Cebrian.)

Q. At the time that * * * the deed to Mrs. Koch was executed by Edward Cebrian, on March 21st, 1935, were you present at any conversations that Edward Cebrian and your sister Isabelle had concerning that whatsoever?

A. I don't remember. I may have been, and there were so many conversations. I don't remember which particular conversation you refer to. We were in conference, the two sisters and the two brothers, many times.

Q. Do you have any present recollection of any conversation between Edward Cebrian and your sister Isabelle Koch concerning that deed?

A. Certainly. I am just telling you. We had conversations, the four of us, and my brother-in-law present, my brother- in-law Mr. McCormick, because he represented—he did most of the work for myself —my sister was not a business woman. She was present, but he took care, and we had many [69] conversations of what was required. This thing was a friendly, brotherly arrangement.

Q. I repeat, Mr. Cebrian: do you have any present recollection of any conversations between Edward Cebrian and Isabelle C. Koch? Let us forget about Mr. McCormick and about any of the others. I am talking about a conversation that you heard between Edward Cebrian and Isabelle Koch. Do you have any present recollection of it?

A. I don't remember any.

Mr. Sooy: He says he doesn't remember.

(Testimony of Ralph Cebrian.)

Mr. Hoppe: I am trying to get an answer to my specific question.

The Witness: That is as far as I can tell you. I cannot remember anything like that. I don't know what you are aiming at, what your purpose is. If you have something there, refresh my memory and I will tell you if it is correct or not.

Q. Is your answer then no?

A. It is neither no nor yes. I don't remember.

Q. You do not remember any specific conversation?

A. No, the way you ask the question, I don't remember.

Q. Regardless of how I phrase the question, do you have any memory whatsoever of any conversations between Edward Cebrian and Isabelle Koch?

A. I give you the same answer, sir. I repeat my answer. [70]

* * *

Q. (By Mr. Hoppe): Following of the filing of this Foster action—I am just doing this for timing—you finally transferred the family homestead to Louis Cebrian, is that right?

A. That is correct. May I explain this? [72]

Q. You can explain on redirect. I would like to have you limit your answers to the questions.

A. All right.

Q. As a part and parcel of that transfer to Louis Cebrian, you settled your controversy with Mr. Foster, did you not? A. Yes, in part.

Q. In part? A. Yes.

(Testimony of Ralph Cebrian.)

Q. On the basis of that settlement, you later filed a claim against the estate of Edward Cebrian for $7,500, did you not?

A. Yes, half the amount.

Q. Half the amount? A. Yes, sir.

Q. So you settled the controversy with Mr. Foster for $15,000, or your brother Loui——

A. Part payment was $15,000, and then it was an understanding that Loui and Edward and myself that Edward, naturally—this note that they were—this deficiency that we owed him, half was Edward's and half was myself, and Edward said, "Whenever I have money I will pay you whatever—the half of what you advance."

The house was taken for $15,000. Therefore Edward owed me $7,500. [73]

Q. And you filed a claim against the estate?

A. Yes.

Q. That is the estate of Edward Cebrian?

A. And I collected it with interest.

Q. Upon the death of your father in 1935, you were appointed the executor of your father's estate, were you not? A. Yes, sir.

Q. And as executor of your father's estate you prepared accounts in that proceeding, did you not?

A. I did. [74]

* * *

The Court: It was an apartment that he occupied down there?

A. It was a rooming house.

Q. I asked you yesterday why you never com-

(Testimony of Ralph Cebrian.)
municated with your brother during that long absence.

A. He didn't write letters. He was a man who would dictate in the office. When he had a secretary he would dictate business letters, but family letters, he wrote very, very few. When he was away in Kentucky, when my father and mother were alive, he would not write. My mother would write to him and they would ask us to write to him. He would send a telegram, "I am fine. I am not writing because I am well." Just a telegram to his father and his mother.

When my father was in Europe, he wrote very few letters to him. I wrote to my father. I was my father's alter ego in San Francisco and I wrote to him every week. I would receive letters from my father, "What about Edward? He doesn't write." He just was not a social correspondent. He wrote very few letters in his lifetime, and there was no occasion for him to write to me.

When he was with my sister Isabelle, she wrote to me but he didn't write. That was his way of being. He was [79] an old bachelor. He had set ways, and that was that. That is the only way I can explain it. But there was the friendliest of feeling, brotherly feeling. While he was at the Palace Hotel in San Francisco and was at the home, before I left it—it was an old home, a twenty room home that had a laundry—he would bring his laundry from the Palace Hotel, his socks, underwear, handkerchiefs, and they were washed on Oc-

(Testimony of Ralph Cebrian.)

tavia Street. The Palace Hotel was a dormitory. We had the friendliest, the most brotherly relations. We disputed, yes. We had arguments like brothers will. But never anything serious. And this man is trying to put a thing here that is absolutely untrue in trying to make it out of whole cloth.

* * *

Q. (By Mr. Hoppe): During your handling of the affairs of the estate of your father, you filed an account? A. I did.

Q. And in that account you asked that a one-half interest in certain oil well royalties that your brother thought he might have coming to him off the Cuyama be deemed an asset of the estate?

A. I think you are misrepresenting that. As I remember, [80] I think we had several wildcatters, while I owned the ranch that he gave leases to. I naturally owned half of that lease, the royalties. I don't remember asking him to give me his royalties. I didn't have to ask him, I don't think. I don't know.

If you have something there, show it to me.

Q. You also in the final account asked to have the paintings, the family portraits, turned over to you, did you not?

A. My father's will bequeathed to me the home and its contents, and the paintings were in the house. Therefore my father gave me the paintings and everything. The furniture was bequeathed to me. I didn't ask him for anything.

(Testimony of Ralph Cebrian.)

Q. And in the final account, you asked that the paintings be sent over to you, did you not?

A. Everything was sent over to me. [81]

* * *

Mr. Hoppe: Is your answer to that question "Yes"?

A. Yes.

Q. In your final account you asked that your brother Edward be ordered to give a note to the estate for something in the neighborhood of $90,000, did you not?

A. Yes. And let me explain that. That was understood by all the brothers and sisters, by my brother Edward, that he had received—my father had loaned him this money. The notes were in the bank and signed by Edward are my father's securities as collateral, and he knew it, and in a friendly way, in a brotherly way he said, "Yes, I owe you this money, and in order to make it legal—" that I don't know anything about—the note was signed. He demanded it, sure, because the legal terminology is "demand," but he gave it willingly. There was no fight, no dissension, nothing. Those were the facts. We had to pay the notes at the bank. They were signed by my brother and the collateral being in the estate of my father, it was very simple.

Q. Did your brother object to your demands to execute the note?

A. He did not object. He was in the conference. "Is this [82] the proceeding, for me to give a note?"

(Testimony of Ralph Cebrian.)

"Yes."

He gave it. There was no discussion.

Q. Did he object to the fact that you wanted the oil paintings?

A. The oil paintings were in dispute—I mean in discussion, this way, that the family felt that he was getting too much, that at least the paintings should be divided, and in a friendly way we decided to divide the paintings. The paintings were in my father's estate, and my father left the home and its contents, and then I willingly—we made an arrangement, and there weren't enough paintings to go around in equal manner. We drew lots. Some got three paintings, others got two paintings—friendly, brotherly, understanding. There was no discussion.

Q. Did your brother dispute your claim to half of the oil royalties?

A. No. I don't understand what you mean by that. I don't know what oil royalties you are talking about. We never received any oil royalties.

Mr. Hoppe: I will ask the Clerk to mark this document. [83]

* * *

(Whereupon the document referred to above was marked Plaintiff's Exhibit No. 23 for Identification only.)

Mr. Hoppe: Mr. Cebrian, I hand you a document entitled "Exceptions to second account of executors and to the report of executor accompanying said

(Testimony of Ralph Cebrian.)

second account," and ask you if you recognize that signature. A. I do, yes.

Q. Is your memory now refreshed sufficiently to tell us whether or not those objections or exceptions were filed in that estate?

The Court: Is that an agreement for the division of the royalties?

Mr. Hoppe: This is a document in which Edward Cebrian excepted to Mr. Ralph Cebrian wanting the oil paintings and wanting half of the oil royalties and wanting him to sign a note. He said they were not entitled to any of that. The royalties were his. He was entitled to his [84] share of the paintings.

The Court: Up to and including the sale of the old family home which you maintained, did you keep and maintain the several rooms and photography gallery your brother had maintained prior to his departure?

A. No, those rooms were his, and he had the key to those rooms, and I never interfered with that. When I moved out of the house in March those rooms were locked, and then he came after the rest of the house was vacated and took out his things. I had keys to these rooms, also, and one morning when he was at the Palace Hotel there were some records he wanted in his business and he asked me to bring them up. I opened the door, got the letters he wanted, locked it, and took them back. It was a friendly relation with those rooms, and

(Testimony of Ralph Cebrian.)

there was never any discussion with him about those, your Honor.

This is a document that was filed by my brother Edward after the probate proceedings. The regular way that was done, it was presented in court. He refers here to oil royalties. I will explain that. In 1919 my father gave the Cuyama Ranch to his four sons, and he drew up an agreement that if oil was ever discovered on the ranch, he retained half of that oil. The four brothers signed that agreement. The agreement was never, I don't think, recorded. It was just an understanding. In the [85] agreement there was a clause that if this agreement interfered with the sale of the property, it would be null and void. It would be in different terms, but that was the intent.

Now, that agreement had to be mentioned in my father's estate because my brother then filed—he has no oil rights, neither did I have, neither did the family, neither did my father's estate, it was perfectly agreeable—he had to file this under the legal end of it. Now, the indebtedness, he, as I said, he borrowed money at the bank with my father's collateral, with my father's permission, but it was a loan to him.

Now, he contended he tried to—he didn't have a penny, himself. He tried to make it say that that was not a loan, that was a gift from my father. We proved to him it was not a gift, because if it had been a gift, my father would have given him the securities or given him the money. There is a

(Testimony of Ralph Cebrian.)

reference to that here. But there was no fight, no enmity at all between us. It was all done in accordance with the law required. What the attorneys advised to be put in to protect everybody.

Here is a clause down here. I didn't read the whole thing:

"Edward Cebrian does not at this time object to the distribution of the assets of the estate [86] except as to the paintings."

So with the paintings we had the arrangement that I said before. There wouldn't be distribution to parts of the estate. The paintings came to me, and from me each one got his share by lot, because there weren't enough paintings to go around with an equal number to each one of the heirs. Very simple.

Q. (By Mr. Hoppe): Do you now recall your brother did file objections to the way he wanted to handle the estate?

A. You have them in your hand.

Q. Do you recall when he did file these?

A. Certainly. You refresh my memory now. It was done over the advice of the attorneys in order that there would be no misunderstandings, but there was no friction.

Mr. Hoppe: We offer Plaintiff's Exhibit 23 in evidence, your Honor. [87]

* * *

The Court: I will allow the document.

* * *

(Testimony of Ralph Cebrian.)

Mr. Hoppe: This document was filed on April 20th, 1937, in Probate File No. 69152 in the estate of John C. Cebrian.

(Whereupon the document referred to above was received into evidence as Plaintiff's Exhibit No. 23.)

Q. (By Mr. Hoppe): As part of the distribution of assets of that estate Edward Cebrian, is that right?

A. Certainly, there wasn't nothing for him. He agreed to that. That is what happened—in a friendly agreement or a friendly acceptance of the facts at the time.

Q. Do you know whether Josephine McCormick gave Edward Cebrian any monies for his share of the income from the [88] Caledonia Farms?

A. I do not know, no. She never gave me any, so I don't think she gave it to him either.

Q. Coming back to the present estate, which is the estate of Edward Cebrian, you have a claim on file for over $13,000 in that case, have you not, in the estate of Edward Cebrian? Have you not filed a claim for $13,000?

A. I filed a claim for $7,500, didn't I?

* * *

Q. (By Mr. Hoppe): For one-sixth of the sum of $56,895.59 plus interest, or a total of $13,398.99?

A. That is correct.

Q. You have that claim, and you filed a claim for $7,500? A. Also.

(Testimony of Ralph Cebrian.)

Q. You will also be the recipient of one-sixth of the estate of Edward Cebrian, is that correct?

A. Yes, sir.

Q. Do you know whether any claims were filed by any outsiders of the family of the estate of Edward Cebrian?

A. Yes, my sister Josephine McCormick filed a claim and my sister Isabelle Koch filed a claim.

Q. And any others that you know of?

A. I don't recall any others. [89]

Q. Do you recall of any strangers to the filing claim?

A. No, unless this note, if you have filed that. You would know that.

Q. That was not filed. I understand that you have not spoken to Edward from 1938, when he went to Los Angeles, until the date of his death?

A. No, I did not. He was down in Los Angeles and I never had occasion to telephone to him. I did not speak to him from the time he left here until his death.

* * *

Mr. Hoppe: When did Josephine McCormick die?

The Witness: November of last year.

* * *

Mr. Cebrian: November, 1953.

Mr. Sooy: Do you remember when her husband St. John McCormick died? [90]

Mr. Cebrian: He died four years ago, to the best

(Testimony of Ralph Cebrian.)

of my recollection. I don't remember the date exactly.

Mr. Hoppe: Was Mrs. McCormick ill for quite a while before she died?

Mr. Cebrian: No.

Mr. Hoppe: Her death was sudden?

Mr. Cebrian: Yes. I do not have the particulars of that. She was in the hospital a very short time and died. [91]

* * *

March 10, 1955, 2:30 P.M.

Mr. Sooy: It will be stipulated that the following statement of facts is correct:

On April 21, 1951, plaintiff herein, alleging to be the holder of the note sued on herein, filed a petition in the United States District Court for the Southern District of California, Central Division, in bankruptcy proceeding No. 23755C for the purpose, among other things, of having it declared that said proceeding, which had been filed August 21st, 1934, for a composition or extention under the then Section 75 A to R of the Federal Bankruptcy Act were still open. Process was served upon your client, who was the defendant, Isabelle C. Koch, as Administratrix of the estate of Edward Cebrian, alias, deceased, and she appeared therein by joining him in a motion to dismiss said plaintiff herein, Charles J. Colville. After the law was exhaustively briefed and the matter was tried and argued before the referee, David B. Head, the referee made an order

dismissing the petition of Charles J. Colville, and upon review of said order taken by Charles J. Colville, Judge William C. Mathes did on September 25th, 1952, confirm the order of Referee David B. Head. * * * It was also found that [92] said bankruptcy proceedings had been dismissed on January 17th, 1935.

* * *

Mr. Sooy: * * * I will now offer in evidence, if your Honor please, a certified copy of the Register of Actions in connection with the San Francisco Probate Proceeding No. 98563, the estate of Edward Cebrian, deceased.

* * *

The Court: It may be marked.

(Whereupon documents referred to above were received into evidence and marked as Defendant's Exhibit C.)

Mr. Sooy: I now offer, if your Honor please, a certified copy of a creditor's claim filed by Joseph C. McCormick in the matter of the estate of Edward Cebrian pending in [93] San Francisco in the amount of $821.20, said claim having been approved by the administratrix and by the judge of the San Francisco Superior Court.

* * *

The Court: It may be marked.

(Whereupon document referred to above was received into evidence and marked as Defendant's Exhibit D.)

Mr. Sooy: Will you mark that D-1, please? There will be four parts.

(The document referred to was thereupon marked Defendant's Exhibit D-1.)

Mr. Sooy: I offer now creditor's claim filed by Josephine C. McCormick in the matter of the estate of Edward Cebrian, pending in San Francisco, in the amount of $6,350. Such claim was approved by the administratrix and by the court.

The Court: It may be marked.

* * *

(Whereupon document referred to above was received into evidence and marked as Defendant's Exhibit D-2.)

Mr. Sooy: I offer now a creditor's claim filed in the matter of the estate of Edward Cebrian by Josephine C. McCormick in sum of $4,056.69, which claim was approved [94] by the administratrix and by the court.

* * *

The Court: It may be marked.

(Whereupon the document referred to above was received into evidence and marked as Plaintiff's Exhibit D-3.)

Mr. Sooy: I offer a fourth creditor's claim filed by Josephine C. McCormick in the matter of the estate of Edward Cebrian in the sum of $1,669.77.

* * *

Mr. Sooy: That claim was also approved both by the administratrix and by the court.

(Whereupon the document referred to above was received into evidence and marked as Defendant's Exhibit D-4.)

Mr. Sooy: I now offer as Defendant's next in order an order for a copy of the record dated December 15th, 1949, certified as correct by the deputy clerk of the San Francisco Superior Court, which shows that some 66 pages from the estate of John C. Cebrian, Probate File No. 69152, were ordered by Charles J. Colville, 10753 Lyndbrook, Los Angeles, 24, and the date the fee was December 15th, 1949.

* * *

(Whereupon document referred to above was received into evidence and marked as [95] Defendant's Exhibit E.)

Mr. Sooy: I offer an order for a copy of record dated April 21, 1950, which shows that the entire files in the matter of the estate of Edward Cebrian were ordered certified, prepared and certified, showing that the order was filed on three dates: April 21, 1950; April 24, 1950, and April 25, 1950.

* * *

(Whereupon the document referred to above was received into evidence and marked as Defendant's Exhibit F.)

Mr. Sooy: I offer a certificate prepared by Martin Mongan, County Clerk, by J. Farley, Deputy,

purporting to show that no claim has been filed in the matter of the estate of Edward Cebrian in San Francisco by any of the following persons, viz: John S. Barbee; Van-Meter Terrill Feed Company; Daylor Van-Meter; First National Bank and Trust Company of Lexington, Kentucky; Charles J. Colville or Wilma Urch Colville, based upon a promissory note of Edward Cebrian, dated November 15th, 1932, or upon any other claim or obligation whatever.

* * *

(Whereupon the document referred to above was received into evidence and marked as Defendant's Exhibit G.) [96]

Mr. Sooy: I will read now from the deposition of Hugh J. Weldon taken in this matter in the city of Santa Barbara on April 23rd, 1953, in the presence of counsel for both parties.

* * *

"Question: I understand, Mr. Weldon, Plaintiff's Exhibit No. 2 for Identification is your correspondence file pertaining to the Edward Cebrian note which is in evidence as Plaintiff's Exhibit—I mean which has been identified as Plaintiff's Deposition No. 1, is that correct?

"Answer: Yes, that and preliminary matters preceding the execution of this note."

Mr. Hoppe: May the record show that Plaintiff's Exhibit Deposition No. 1 is now Plaintiff's Exhibit 1 in Evidence.

Mr. Sooy: (Continuing reading.)

"Question: And I understand that you have received all of the letters which are addressed to you, and that you have sent out the originals of the letters which appear to come from you?

"Answer: That is right. I might say, in office copies I do not add my signature, but I can [97] testify that every letter in there on yellow paper is a carbon copy of a letter of an original which was sent out by me and mailed under my signature.

"Question: Now, Mr. Weldon—the party stipulates, subject to your approval, Mr. Weldon, that your file, which is marked Plaintiff's Deposition Exhibit No. 2, may be forwarded to the clerk of the Federal District Court for the Northern District of California, and that counsel for the respective parties may thereupon then file, have photostatic copies made of such documents as they choose to offer in evidence at the trial of this cause, and obtain an order of the court returning the original exhibit to you as soon as the protostatic copies are made; is that agreeable to you?

"Answer: Entirely agreeable.

"Mr. Hoppe: Is that our stipulation?

"Mr. Sooy: With the further proviso that all photostatic copies of documents in the file shall be attached to and become exhibits to the Weldon deposition in evidence.

"Mr. Hoppe: That is correct.

"Mr. Sooy: So stipulated." [98]

* * *

EDWIN KOCH

was called as witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your name, your address and your occupation to the Court.

A. Edwin A. Koch, 2090 Pacific Avenue, San Francisco.

Direct Examination

By Mr. Sooy:

Q. What is your occupation?

A. Salesman.

Q. Mr. Koch, you are a husband of the defendant Isabelle C. Koch, are you not? [100]

A. I am.

Q. When were you married?

A. November 23rd, 1925.

Q. Where were you and Mrs. Koch living in 1933? A. 1933 we were in Europe.

Q. When did you return to California?

A. I believe it was December, 1933.

Q. Where did you reside in California when you first returned from Europe in that year?

A. I went to San Jose at first and spent perhaps eight or nine months or a year there.

Q. When you say you went, you mean Mrs. Koch and yourself?

A. We both went to San Jose, yes.

Q. Where did you go after you left San Jose?

(Testimony of Edwin Koch.)

A. We came to San Francisco for a while, and after that we went to the Cuyama Ranch.

Q. When you say "for a while," what do you mean in point of time?

A. I don't remember exactly, but I think perhaps a month or two months we came to San Francisco.

Q. Did you then leave San Francisco?

A. Then we went to the Cuyama Ranch.

Q. That is the ranch that has been referred to here as being in Santa Barbara County?

A. That is correct. [101]

Q. When did you go to the Cuyama Ranch, Mr. Koch?

A. I think it was the end of 1934 or right around there.

Q. How long did you stay there?

A. I was there—we were there until about 1938, the end of 1938.

Q. Do you remember approximately when you left in 1938?

A. I would think it would be in about November, 1938.

Q. Did either you or Mrs. Koch leave the Cuyama Ranch during that period from 1934 to 1938?

A. Oh, yes, we made frequent trips to San Francisco, Santa Barbara, Los Angeles, Bakersfield, many different places.

Q. Did you always make those trips together?

A. Not always, no. Sometimes Edward Cebrian

(Testimony of Edwin Koch.)

and myself made business trips. We were trying to get people interested in putting cattle on the ranch on a percentage basis. We were looking for farmers, for cane farmers, for potato farmers. We were trying to build up a business so we could save the ranch.

Q. Did Mrs. Koch ever leave the Cuyama Ranch without you during that period of time?

A. Oh, yes.

Q. Did you leave the Cuyama Ranch before or after Edward Cebrian did?

A. Mrs. Koch and I left after Mr. Cebrian had gone. [102]

Q. Approximately when did Edward leave the Cuyama Ranch for good?

A. I think he left in March or April, 1938, and I believe we left in about November.

Q. Under what circumstances did you and Mrs. Koch remain at the ranch after he left?

A. The Hibernia Bank had some tenant farmers there on a share basis, and they asked me to stay and look after their interest, to see that they got the proper share of their crops.

Q. Did you do so? A. Yes, I did.

Q. Do you know where Edward Cebrian went when he left the Cuyama Ranch in the spring?

A. He went to Los Angeles. He was interested in saving the ranch. He went down to interest people in buying it. He was in Santa Barbara, he went to San Francisco. He contacted attorneys to see if he could not save the ranch.

(Testimony of Edwin Koch.)

Q. Did he tell you he made those trips for those purposes? A. Yes, he did.

Q. Did he return to San Francisco in 1938 at all? A. Yes, he was in San Francisco.

Q. Do you know where he stayed here?

A. I believe it was at the Palace Hotel.

Q. Did you come to San Francisco during that part of 1938 [103] after he had left?

A. Yes, I did.

Q. Where did you see him?

A. I saw him at the Palace Hotel.

Q. Where did you reside after you returned to San Francisco from the Cuyama Ranch?

A. We came to live at the Fairmont Hotel.

Q. How long did you reside there?

A. We resided there until about two years ago. We moved to a little apartment on Pacific Avenue.

Q. Was Edward Cebrian still in San Francisco when you returned from the Cuyama Rancho for good to make your home here?

A. Was he still in San Francisco?

Q. Yes.

A. I don't remember. I believe he was in Los Angeles but I am not sure.

Q. Are you familiar with Mrs. Koch's financial affairs?

A. Yes, we were very close in our relations.

Q. Did she advance monies from her personal funds to pay the rental due the Hibernia Bank under the lease? A. Yes, she did.

(Testimony of Edwin Koch.)

Q. Do you know approximately how much she advanced?

A. I think it was between $12,000 and $13,000, somewheres around there. [104]

Q. Was that by cash or by check?

A. That was by check.

Q. Do you have those checks now?

A. No, we do not.

Q. Have you made a search for them?

A. Yes, we have made a search for them, but when we left the Fairmont Hotel we destroyed a lot of papers that had been accumulating—letters, checks and things we did not think were of any value, and they have disappeared.

Q. Did your wife, Mrs. Koch, prepare and file a claim in Edward's estate based upon those advances? A. Yes, she did.

Q. At the time that claim was prepared, did she have the checks? A. Yes, at that time she did.

Q. Did you ever visit Edward Cebrian in Los Angeles between 1938 and the date of his death in 1944? A. Yes.

Q. On how many occasions, Mr. Koch?

A. I would think perhaps twice a year.

Q. Did he ever come to San Francisco during that same six-year period?

A. I do not recall. I really do not know.

Q. Do you know where he lived in Los Angeles during that period? [105]

A. Yes, his first residence down there was with some friend that had a sort of guest house, and we

(Testimony of Edwin Koch.)

visited on one occasion there, and later he moved over to a Mrs. Melchior's rooming house.

Q. Is that the same Mrs. Melchior who has been referred to here? A. Yes.

Q. And he continued to have to have the room in her house as long as he lived, is that correct?

A. Yes, he did.

Q. Did you visit him at both of those establishments? A. Yes.

Q. Are those the only two places that he lived there, so far as you know?

A. To my knowledge, those are the only two places that he lived.

Q. Did he ever write to Mrs. Koch from Los Angeles during that six-year period?

A. Yes, he did.

Q. Did you see and read the letters that he wrote? A. Yes, I did. [106]

* * *

Q. (By Mr. Sooy): Mr. Koch, do you have the letters that your brother-in-law wrote to Mrs. Koch at that time? A. No.

Q. Have you searched for those letters?

A. Yes, we have.

Q. Where have you searched?

A. We searched all through our trunks and baggage and boxes and everything that we had.

Q. Is it correct that those letters are not in existence so far as you know now?

A. That is right.

(Testimony of Edwin Koch.)

Q. They are not available, is that correct?

A. No, sir.

Q. In those letters did your brother ever refer to his being in Los Angeles, his living in Los Angeles?

A. He wrote three or four letters that I remember in which he said that he was unhappy in Los Angeles and wanted to return to San Francisco. At the same time he was asking for more money if he could get it. But he also made it very clear that he wanted to return to San Francisco and make his residence here.

Q. Did he say so in his letters?

A. Yes, he did.

Q. For what purpose did he ask that Mrs. Koch send him funds? Did he specify? [107]

A. For his transportation. He wanted to come up on the bus. He would come up any way that he wanted to. He said that he was not interested at that time in returning to his old habitat, the Palace Hotel, that he would be satisfied living any place that she could find him a room.

The Court: What was that again? He was not satisfied?

The Witness: He was not satisfied—at first Edward Cebrian wanted to stay in San Francisco and live at the Palace Hotel, and Mrs. Koch did not believe that she was justified in paying his bills and keep in the style to which he had been accustomed. That was the reason she advised him to go to Los Angeles and get away from his friends. He

(Testimony of Edwin Koch.)

was a man who liked to have big parties. He had a lot of friends here. He objected to that at first. He didn't want to go to Los Angeles. But she was the one who was supporting him, paying his rent, spending money, and he finally went down there, but he always, even after that, he always said he would like to come back to San Francisco, even if he could not live in that style.

The Court: Did Mrs. Koch advance him monies necessary for his current expenses?

A. Yes, she did.

Q. He lived in rather circumspective style in Los Angeles, I assume?

A. No, he had a very nominal rent. [108]

Q. Nominal?

A. Yes, yes, and he was working in Los Angeles as a translator. I do not believe he received much of a salary. However, Mrs. Koch had to augment his expenses.

Q. Did he have any means of support other than the advances which were currently made?

A. None whatsoever, sir, except for a while he was employed in Los Angeles.

Q. As a translator? A. Yes, sir.

Q. How old was this gentleman when he passed away?

Mr. Sooy: Sixty-two, your Honor.

The Court: Pardon my interruption.

Q. Was there any bitterness between Mrs. Koch and Mr. Cebrian arising out of the circumstance that he had to go south?

(Testimony of Edwin Koch.)

A. None whatsoever. There was a very close, dear relationship. She loved him like a mother.

Q. (By Mr. Sooy): Were the letters to which you referred, Mr. Koch, typed or in his writing?

A. They were in his handwriting.

Q. Did he send any typewritten letters to his sister during the six years he was in Los Angeles?

A. He did send some typewritten letters, and he sent any number of telegrams and telephone calls. He was a man who evidently hated to write longhand letters. [109]

Q. Do you know of any practice or custom which he had of making an additional longhand copy of letters which he wrote?

A. That was his practice when he wrote a letter. He would generally make a sketch.

Q. I requested you to search for any letters or documents in his handwriting.

A. I beg your pardon?

Q. Have I asked you and Mrs. Koch——

A. Yes, you have.

Q. Were you able to find any documents in his handwriting? A. No, I have not found any.

Q. Did you find any copy of a letter or letters which he apparently wrote?

A. No, I have not found anything in regard to that. [110]

Q. Did you state when you moved from the Fairmont Hotel to Pacific Avenue?

A. I moved in 1951, in the early part. I think it was April.

(Testimony of Edwin Koch.)

Q. 1951? A. Yes.

Q. Three years ago?

A. No, two years ago. 1952. Pardon me.

Q. Did you and Mrs. Koch ever drive to Los Angeles between 1938 and 1944?

A. Yes, we did.

Q. Did you ever visit with Edward Cebrian in Los Angeles?

A. We always, every time we went to Los Angeles we visited with him.

Q. Did you ever discuss in Los Angeles with Edward Cebrian the question of his living there?

A. He always wanted to come to San Francisco. He always said that he wanted to make San Francisco his home on every occasion that we were down there, and on one particular occasion we had just come from a little trip and our car was full of our suitcases and he wanted to come back that same day with us, and I told him we didn't have room, we didn't have any accommodations in San Francisco for him. So he actually broke down and cried. He had tears.

Q. And can you tell us when that was? [111]

A. I think that was in 1943. I remember that I had been ill and we thought we would take a few days down south and see if it would help recuperation.

Q. I didn't hear you. Who had been ill?

A. I had been ill.

Q. Mr. Koch, did you and Edward Cebrian ever

(Testimony of Edwin Koch.)

have a discussion about finding him employment in San Francisco?

A. He asked me to find employment for him and I tried. I asked any number of friends of mine and I also tried to find him living quarters. I went to the Elks Club and I went to Herbert's Hotel for men on Powell Street, two or three different places to see if we could get something reasonable which was close to what he was paying in Los Angeles.

Q. Were you able to find such accommodations?

A. No, I could not at that time.

Q. During what period of time was that, those conversations?

A. That was in 1943 and 1944 that I tried to find the places.

Q. By the way, on this occasion when you passed through Los Angeles on the return from the trip which you said was in 1943, what was the condition of health of Mr. Edward Cebrian?

A. He was not working that day, and I think the man was really sicker than we anticipated. I thought he was a sort of a baby person. I mean everybody felt sorry for Edward Cebrian. But he was really a sick man.

Q. Did you and Mrs. Koch see him in Los Angeles at any time [112] in 1944 before his death?

A. Yes.

Q. Was he working at that time?

A. Well, not the day that we saw him. I don't

(Testimony of Edwin Koch.)

remember whether it was on a Saturday or not, but I know he was home that day.

Q. You stated that you tried to find him reasonable quarters in San Francisco. Did he ask you to do so? A. He asked me that, yes, he did.

Q. Did he ever tell you that he had decided to make Los Angeles his home?

A. Never. He told me many times that he was dissatisfied there, that his friends, most of his friends lived in San Francisco and he would like to be here and he would like to be near his family.

Q. Were any of the other members of the Cebrian family living in Los Angeles during that period of time? A. No, definitely not.

Q. When Edward Cebrian left the Cuyama Rancho in the spring of 1938 did he tell you whether or not he had abandoned hope of recovering the ranch?

A. Oh, no, on the contrary, he told me about how he was going to get attorneys to instigate proceedings, to start a lawsuit. He was always to me very hopeful that he would save the ranch. He had great hopes for oil. While we lived [113] on the ranch we drilled several holes, drilled several oil holes, and we would get a little indication of oil, then they would light the gas, it would last for three days and then peter out. I mean everybody would become animated to think this was it, nothing would come of it. It was after he left that they had the big oil strike down there.

Q. Judge Harris asked you what the feelings

(Testimony of Edwin Koch.)

were between Mr. Edward Cebrian and your wife and you answered to him. What were the feelings between Edward Cebrian and yourself?

A. Every since I have known him we have been very close.

Q. Was there ever any friction or rancor between you and Edward Cebrian?

A. Never. We visited together many times. We visited in New York one time together. We have always had very pleasant relations.

Q. You were in court this morning, were you not? A. I was.

Q. You heard the testimony about disputes arising out of John Cebrian's estate, did you not?

A. Yes. [114]

* * *

Q. (By Mr. Sooy): Do you recall any conversations between your wife, Mrs. Koch, and Mr. Edward Cebrian about the settlement of Ralph Cebrian's amount?

A. Yes, we talked about it many times. We talked about the paintings, we talked about Edward's note that was owed to the estate. We discussed all angles of Mr. Cebrian's estate.

Q. Did Mrs. Koch join in the objections which Edward Cebrian made to his brother Ralph's accounts? A. I don't exactly know——

Q. Did she join, did she file objections also?

A. Not to my knowledge.

Q. Do you have a real estate license, Mr. Koch?

A Yes, I do.

(Testimony of Edwin Koch.)

Q. How long have you had that?

A. Oh, I have had a license since 1922 or 1921.

Q. During 1934 and 1935, after you returned from Europe, did you have any discussions with Edward Cebrian about the possible sale of Caledonia Farms?

A. Edward Cebrian asked me to try to find a buyer for the Caledonia Ranch, and I made several trips to Sacramento. I called on several real estate offices and I talked to some of the Ranchers around there, but I could not get any kind [115] of offer on that property at that time.

Q. Did you talk to Mr. A. F. Turner?

A. I talked to Mr. Turner, who had charge of what they called the West Sacramento Properties up there. He was familiar with it. As I remember it, he was also trying to sell it but couldn't get an offer.

Q. Did the brothers have an asking price for the farm at that time?

A. I said, "Ed, how much do you want for this thing?" He said, "Ask $50,000 but get an offer."

Q. Was that gross or net?

A. That was gross.

Q. Were you ever able to get an offer from the Caledonia Farms?

A. No, I never had an offer. I even tried to trade it at one time for an equity in a building but I could not make that a go.

Q. Did you ever meet Charles J. Colville, Mr. Koch?

A. I met him once in Los Angeles, yes.

(Testimony of Edwin Koch.)

Q. Do you remember when you met him?

A. I believe it was in 1950.

Q. Do you remember the month?

A. No, offhand I do not. I think it was March but I am not sure.

Q. Where did you meet him? [116]

A. He came to see Mrs. Koch and myself at the Gaylord Hotel in which we were staying in Los Angeles. Mr. Burch, Mr. Sooy, Mr. Colville, Mrs. Koch and myself were there.

Q. Was a conversation had at that time?

A. Yes, Mr. Colville came in with Mr. Burch. Mr. Burch we had known for a good many years because he had drilled some dry holes on the Cuyama Ranch, and he introduced Mr. Colville and we sat there, and I asked Mr. Colville his business.

He said, "I am a searcher of records." He said, "I go into estates and see if I can find any flaws in them in order that I might turn them over to my own personal gain."

He said, "I was interested in the Cuyama Ranch as soon as oil was discovered." He said, "I came looking for quail and I found much bigger game."

He said, "I bought a note from a bank in Kentucky, I believe it was, for $500," and that he was going to try to reopen the bankruptcy proceedings in the Edward Cebrian estate. He said, "I have a stack of photostatic copies that high."

He said, "I have gone into this very, very thoroughly. I have gone into all of the records in Santa Barbara county, San Luis Obispo county, and

(Testimony of Edwin Koch.)

I know about the proceedings that were filed in Los Angeles by Mrs. Koch. I know about the proceedings that were filed in San Francisco. I know about the Caledonia Farms. I know about a horse judgment that was filed I think against the estate." [117]

The Court: A horse Judgment?

The Witness: Yes, sir, there was some judgment that was against Edward Cebrian for feed.

The Court: A feed bill?

The Witness: Or the sale of a horse. We always called it the horse judgment. It was the sale of a horse or a feed bill. I don't know which.

He said, "If you offered to pay this note I would refuse it. I don't want a cent."

Q. (By Mr. Sooy): Did he tell you what his plans were in connection with the Cebrian affairs?

A. He said his plan was to restore the Burch lease. He said the Richfield Oil Company had taken approximately one hundred million dollars out of the Cuyama Ranch, and he was going to restore that lease.

Q. Did he tell you the method he would use to restore the Burch lease?

A. Well, he was going into the bankruptcy proceedings to reopen the case, that he had bought this note for that purpose.

Q. Did you identify I. Lee Burch as one of the lessees from Cebrian brothers, one of the oil lessees?

A. Yes, he was. He had an oil lease at the Ranch,

(Testimony of Edwin Koch.)

and while we lived there he put down two or three dry holes.

Mr. Sooy: You may cross-examine. [118]

Cross-Examination

By Mr. Hoppe:

Q. Mr. Koch, in the bankruptcy proceedings that we are talking about Mr. Colville did actually endeavor to reopen those proceedings, did he not?

A. I think he did, yes.

Q. And your wife, the defendant in this action, appeared in those proceedings to oppose the re-opening, did she not? A. That is right.

Q. Your wife has filed claims against the estate of Edward Cebrian for the monies she advanced him, has she not? A. Yes, she did.

Q. She also filed a claim in the estate for some 13,000 odd dollars that Edward Cebrian was alleged to owe the estate of John Cebrian, is that not right?

A. No.

Q. Did she not file such a claim?

A. Oh, that I don't know. The twelve or thirteen thousand dollars that I mentioned was for payment that she had made as rental on the Cuyama Ranch to the Hibernia Bank.

Q. The particular claim I have in mind was a claim for some thirteen-thousand-odd dollars which Edward Cebrian had disputed when they closed the John Cebrian estate. Do you recall such a claim?

A. No, I do not.

(Testimony of Edwin Koch.)

Q. You heard Ralph Cebrian testify that he filed such a [119] claim, did you not?

A. Oh, yes, that was her interest in the debt owed to Mr. Cebrian's estate.

Q. Yes, and she filed a claim for that also?

A. Yes, that is right.

Q. Likewise, Mrs. Koch is an heir of the estate of Edward Cebrian?

A. Yes, of Mr. John C. Cebrian, yes.

Q. And also Edward Cebrian?

A. Yes, she has a sixth interest in the estate.

Q. About how many trips did you say you took to Los Angeles to visit with Edward down there?

A. I would say we saw him perhaps twice a year.

Q. Over a period of about six years; that would be 12 visits? A. Yes, something like that.

Q. Was he working on the days that you went down to see him or did you see him on holidays?

A. That I don't remember. I know on both occasions he was home, and don't think it was on a holiday. I don't remember that. It might have been a Saturday. I am not sure. But he was home.

Q. Going back to the time when you and your wife lived on the Cuyama Ranch, Edward was also living there during that period? The three of you were living there? A. Yes. [120]

Mr. Hoppe: No further examination.

Mr. Sooy: That is all, Mr. Koch. [121]

* * *

Mr. Sooy: If Your Honor please, I would like to inquire. Will the plaintiff offer any rebuttal?

Mr. Hoppe: We have offered our rebuttal. Before closing proofs, Your Honor, I would like to get a stipulation from counsel here that on April 1st, 1948, the appraiser filed the appraisal in the estate of Edward Cebrian showing total assets of $14 for a refund on a railroad ticket, $200 on the Cuyama County property we were talking about, $12,714 on the Yolo County property.

Mr. Sooy: The latter was gross, that is, a gross estate. The Yolo County was $112,500.

Mr. Hoppe: $112,500 and the other thing—so stipulated.

Mr. Sooy: It is stipulated that that is the fact, although I object to the materiality of it in this proceeding.

The Court: I will consider it as part of the proof.

Mr. Sooy: Your Honor would have to know what all the claims were.

The Court: That is a gross figure.

Mr. Sooy: That is a gross figure.

Mr. Hoppe: And that the total claims filed in the estate [145] were $118,702.55, and that all of the claims filed were claims filed by the immediate relatives of the executrix.

The Court: The immediate relatives of the executrix or the deceased?

Mr. Hoppe: The deceased, of course as of August 16th, 1949.

Mr. Sooy: That is the fact. Those are the figures shown in the account.

Mr. Hoppe: And that Isabelle C. Koch's claim for money loaned in connection with the Cuyama Rancho was $13,573.70, and that in 1938, she gave Edward Cebrian for rent and board $334.10; in 1939, $218.75; in 1940, $590.00; in 1941, $540.00; in 1942, $165.00, and then for a period of two years prior to the death of Edward Cebrian, she filed a claim for money loaned to Edward Cebrian, now deceased, by the claimant Isabelle C. Koch, his sister, at the instance and request of the deceased at the rate of $60.00 per month for a period of two years immediately prior to his death for the care, support, medical care and board and room of the deceased in the amount of $1,440.00.

Mr. Sooy: It will not be stipulated in the form that you put it. It will be stipulated that she filed two claims with the amounts that you have referred to. However, having prepared the claims I know that those are the only checks that she could find. We filed claims only for checks she exhibited [146] to me. Furthermore, the claim for $1,440.00, to which we have last referred, was paid. The claim of $16,471.55, being those advances from 1936 through 1942, were not paid, for the reason that it appeared that the statute of limitations had run, and furthermore, as I said, those are not the only advances made. They do not include any advances made in cash.

Mr. Hoppe: Subject to that limitation we accept the stipulation.

The Court: The stipulation may be noted in the record. We will resume at 10 o'clock.

(Thereupon a recess was taken until March 11th, 1954, when this matter was argued.)

[Endorsed]: Filed April 22, 1955. [147]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint.

Notice and Motion to Dismiss Complaint.

Notice and Motion to Dismiss Complaint or for Summary Judgment.

Plaintiff's Motion for Summary Judgment and Notice Thereof.

Affidavit of Minnie Melcher in Opposition to Pending Motions.

Affidavit of Carl Hoppe with Exhibits A to E Attached.

Reporter's Transcript of Motion to Dismiss Complaint and for Summary Judgment of Jan. 5, 1953.

Order on Pending Motions.

Notice and Motion for Order Setting Aside Order on Pending Motions signed Jan. 23, 1953, and for Rehearing Under Rules 59 and 60(b).

Judgment and Order on Pending Motions.

Order Granting Motion to Vacate Judgment.

Plaintiff's Motion to Modify Court Order Granting Motion to Vacate Judgment Dated Feb. 19, 1953, & Notice Thereof.

Answer.

Order Denying Motion for Modification.

Notice and Motion of Willma Urch Colville, Executrix, to be Subsituted for Deceased Plaintiff.

Order Substituting Executrix as Plaintiff.

Order for Judgment in Favor of Defendant.

Stipulation and Order.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record on Appeal.

2 Volumes of Reporter's Transcript.

Plaintiff's Exhibits Nos. 1 to 17, Inclusive; 17-A, 18 to 21, Inclusive; 22-A to 22-I, Inclusive; 23, 24 and 26.

Defendant's Exhibits A, B, C, D-1 to D-4, Inclusive, and E to G, Inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of April, 1955.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14741, United States Court of Appeals for the Ninth Circuit. Wilma Urch Colville, Executrix of the last will and testament of Charles J. Colville, Deceased, Appellant, vs. Isabelle C. Koch, individually and as administratrix of the estate of Edward Cebrian, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14741

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Appellee.

STIPULATION RE RECORD ON APPEAL

Subject to the approval of the Court, the parties stipulate as follows:

1. During the course of oral and written arguments, defendant urged the following affirmative defenses before the District Court:

(a) Plaintiff failed to file a claim in the Edward Cebrian probate proceedings as required by Section 700 of the Probate Code.

(b) The cause of action was barred on May 15, 1937, under the four-year Statute of Limitations, Section 337 (1) C.C.P.

(c) The action is barred even if it contains a waiver of statute of limitations under California Borrowing Statute (Section 361, C.C.P.), since all waivers of the Statute of Limitations are void un-

der the laws of Kentucky where the note was payable and any action on the note was barred under the laws of the State of Kentucky.

(d) Plaintiff's cause of action based on fraud is barred by the three-year Statute of Limitations, Section 338 (4), C.C.P.

(e) The final judgment of the San Francisco Superior Court in Probate finding the fact of Edward Cebrian's San Francisco residence is binding in this action.

(f) The laches of plaintiff and her predecessors bars the relief sought.

(g) The law of Kentucky determines the validity and meaning of the "diligence" clause in the promissory note in suit, under Section 1646, Civil Code.

(h) Plaintiff failed to establish title to the promissory note in suit.

(i) The place of contracting was Kentucky.

(j) The place of performance of the promissory note (where payment was due) was in the State of Kentucky.

(k) There is no issue before this Court regarding "constructive trust."

(l) Plaintiff's cause of action is barred under Section 360.5 Code of Civil Procedure, even if the language in the promissory note waiving diligence can be construed as a perpetual waiver of the statute of limitations.

(m) The language in the promissory note waiving diligence in bringing suit does not constitute a waiver of the statute of limitations under either California law or the law of Kentucky where the note was made payable, but has a specific well defined purposed by reason of the special statutory requirements of Kentucky and some other states, not including California, which require diligence in bringing suit against the maker on penalty of losing rights against endorsers and other third parties.

2. Appellant urges only the following errors:

(a) The District Court erred in finding that the note in suit provided for "simple interest" (Finding 10).

(b) The District Court erred in failing to find that Edward Cebrian, at the time of his death, was a resident of the County of Los Angeles, State of California (Finding 11).

(c) The District Court erred in finding that defendant's only reason for filing a Petition for Letters of Administration in Los Angeles was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of Los Angeles (Finding 13).

(d) The District Court erred in determining that defendant could and would have proceeded with the Los Angeles proceedings "solely" to meet the contingency set forth in Paragraph "c" above (Finding 13).

(e) The District Court erred in finding that defendant did not intermeddle with the proper probate

of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently (Finding 14).

(f) The District Court erred in finding that the allegations in the Petition for Letters of Administration filed February 10, 1945, in San Francisco, as to the legal residence of Edward Cebrian at the time of his death "were true and correct according to the best information and belief of defendant" (Finding 15).

(g) The District Court erred in finding that no acts of defendant have deprived plaintiff or her predecessors of their right to file claims (Finding 16).

(h) The District Court erred in finding that all of the facts alleged in Plaintiff's Complaint inconsistent with findings 1 to 17 were untrue (Finding 17).

(i) The District Court erred in finding that all the facts alleged in Defendant's Answer inconsistent with findings 1 to 18 were true (Finding 19).

(j) The District Court erred in finding that no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian (Finding 20).

(k) The District Court erred in concluding that any suit or action to recover on the note in suit is forever barred by reason of the failure of the holder of said promissory note to file a creditors claim in probate therein within six (6) months

from the date of the first publication of notice to creditors (Conclusion I).

(l) The District Court erred in finding that the plaintiff and her predecessors in interest had constructive notice of the hearings on the defendant's Petition for Letters of Administration in the San Francisco Superior Court (Conclusion II).

(m) The District Court erred in finding and/or in concluding that the Notice of Hearing in the San Francisco petition given by defendant was in the manner required by law (Findings 12 and Conclusion III).

(n) The District Court erred in concluding that the exclusive jurisdiction to administer the estate of Edward Cebrian was in the San Francisco Superior Court (Conclusion III).

(o) The District Court erred in finding that defendant committed no fraud, extrinsic character with respect to the probate proceedings in the matter of the estate of Edward Cebrian either in Los Angeles or San Francisco (Conclusion III).

(p) The District Court erred in concluding that plaintiff is not entitled by law or under the evidence induced under trial of this case to a judgment that defendant is a constructive trustee for plaintiff (Conclusion V).

(q) The District Court erred in concluding that defendant is entitled to a judgment that plaintiff take nothing by her complaint (Conclusion VII).

(r) The District Court erred in failing to enter judgment for plaintiff in the above-entitled action

in accordance with the prayer of relief and in failing to enter findings of fact and conclusions of law consistent with said Prayer for Judgment.

3. Plaintiff shall be required to print the following pleadings only:

(a) The Complaint filed November 6, 1952.

(b) The Answer filed herein on March 2, 1953.

(c) The Order for Judgment in favor of defendant filed on November 10, 1954.

(d) Findings of Fact and Conclusions of Law filed on February 14, 1954.

(e) Judgment filed on February 14, 1955, and entered on February 15, 1955.

4. The plaintiff shall be required to print only those portions of the transcript of the proceedings as are set forth in appellant's Amended Designation of Record filed in this Court on June 8, 1955, and the Clerk is requested to delete from the transcript the portions thereof noted in the appendix accompanying said Amended Designation of Record.

5. Either party shall have the right to refer to the balance of the pleadings, transcript on file herein or the exhibits on file without further and additional printing.

6. No reference to cross-motions for summary judgment, or to issues tendered thereby, or decided, if any, shall be made by either party, nor shall any ruling made by the District Court of Appeals relating to the motions to dismiss or motions for summary judgment be deemed, or construed to be,

determinative of any issue to be raised by either party on this appeal.

7. In the event defendant hereafter determines that some portion of the pleadings or of the reporter's transcript is required by defendant, plaintiff will, upon the written request of defendant's counsel, cause to be prepared and printed a supplemental record containing such matter specified by defendant, within the limitations of Rule 75(e) F.R.C.

8. The itemization of issues and contentions of the respective parties hereinbefore set forth is not necessarily exhaustive, nor shall it be deemed to prevent either party from presenting argument or briefs urging additional points actually presented to the trial court or arising from the pleadings.

9. Each party hereby waives any and all right to contend that the District Court of Appeals committed error in the admission or refusal to admit evidence, oral or documentary, and each party does hereby stipulate that all testimony, documents and depositions introduced into evidence be deemed fully competent evidence.

CARL HOPPE,

/s/ CARL HOPPE,

By /s/ STEPHEN S. TOWNSEND,
Attorney for Appellant.

/s/ CHARLES D. SOOY,
Attorney for Appellee.

[Endorsed]: Filed July 1, 1955.

No. 14,741

In the

United States Court of Appeals

For the Ninth Circuit

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Plaintiff-Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant-Appellee.

Appellant's Opening Brief

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TABLE OF CONTENTS

	Page
Jurisdiction	1
Statement of the Case	2
Questions Presented	2
The Pleadings	3
The Facts	4
Specification of Errors	12
Argument	14
Summary of Argument	15
Edward Cebrian Was a Resident of Los Angeles	~~18~~ 21
By Statute the Cebrian Estate Should have been Probated in Los Angeles	28
Collateral Attack on Judgment Not Available as Remedy	28
Equity has Power to Grant Relief from Judgment	29
Under California Law, a Fraudulent Intent is Not an Essential Element to Impress a Trust	33
The Testimony of the Administratrix Warranted Relief	34
Jurisdictional Factor is Extrinsic	39
The Ex Parte Nature of the Hearing Was Extrinsic	41
Los Angeles Public Records Are an Extrinsic Factor	42
The Caledonia Farms Arrangement Was an Additional Extrinsic Factor	45
Plaintiff Did Not Have Constructive Notice of the San Francisco Proceedings	48
The District Court Erred in Deciding Causal Relation	51
The Action is Not Barred for Failure to File a Claim in the Probate Proceedings	54
The Cebrian Note Did Not Provide Simple Interest	55
The Disputed Findings Do not Support the Judgment	57
The District Court on Remand Should Determine Laches and Limitations	61
Conclusion	61

Cases Pages

Adams v. Hackensack Trust Co. (1945), 156 Fla. 20, 22 So. 2d 392 ..... 19, 21, 44, 54
Arrowsmith v. Gleason (1889), 129 U.S. 86, 32 L.ed. 608, 9 S.Ct. 246 ..... 17, 30
Arrowsmith v. Harmening, 42 Ohio St. 254 30
Ashford v. Traylor (1931), 43 Ga. App. 507, 159, S.E. 777 ..... 21, 56
Estate of Margaret Austin (1879), Myrick, p. 237 ..... 16, 27

Bacon v. Bacon (1907), 150 Cal. 477, 89 P. 317 ..... 16, 19, 29, 32, 42
Beckett v. Selover (1857), 7 Cal. 215 ..... 20, 50, 52
Bergin v. Haight (1893), 99 Cal. 52, 33 P. 760 ..... 20, 49
Estate of Brady (1918), 177 Cal. 537, 171 P. 303 ..... 16, 27
Bullis v. Staniford (1918), 178 Cal. 40, 171 P. 1064 ..... 16, 27

Caldwell v. Taylor (1933), 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194 ..... 16, 32
Campbell-Kawannanakoa, et al. v. Cambell (1907), 152 Cal. 201, 92 P. 184 32
Cardozo v. Bank of America (1953), 116 C.A. 2d 833, 254 P.2d 949 ..... 17, 32, 33, 36
Cowan v. State (1916), 15 Ala. App. 87, 72 So. 578, 579 60
Estate of Crisler (1948), 83 Cal. App. 2d 431, 188 P.2d 772 ..... 16, 29
Crow v. Crow (1914), 74 Okla. 455, 139 Pac. 122 ..... 18, 41
Curtis v. Schell (1900), 129 Cal. 208, 61 P. 951, 79 A.S. 107 ..... 17, 19, 32, 35, 42

Diamond v. Connolly (C.C.A. 9, 1918), 251 Fed. 234 ..... 17, 30
Diamond v. Connolly (C.C.A. 9, 1921), 276 Fed. 87, 91 ..... 17, 34
Dunlap v. Steere (1891), 92 Cal. 344, 28 P. 563, 27 A.S. 143, 16 LRA 361 ..... 19, 20, 42, 49

In re Griffith (1890), 84 Cal. 107, 23 P. 528, 24 P. 381 ..... 16, 29

Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717 ..... 17, 18, 19, 20 30, 38, 42, 54
Holabird v. Superior Court (1929), 101 Cal. App. 49, 281 P. 108 ..... 16, 29
Estate of Hudson (1883), 63 Cal. 454 ..... 17, 31

Pages

Irwin v. Scriber (1861), 18 Cal. 499....16, 28, 50

Kasparian v. Kasparian (1933), 132 Cal. App. 773, 23 P.2d 802....19, 32, 42
Larrabee v. Tracy (1943), 21 C.2d 645, 134 P.2d 265....18, 32, 39
Laun v. Kipp (1914), 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655....18, 37
Estate of Lenci (1930), 106 Cal. App. 171, 288 P. 841.... 59

Magraw v. McGlynn (1864), 26 Cal. 420....17, 35
Miller v. Higgins (1910), 14 Cal. App. 156, 111 P. 403....18, 39
Monk v. Morgan (1920), 49 Cal. App. 154, 192 P. 294....19, 32, 45
McGuinness v. Superior Court (1925), 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110....18, 32, 40

Estate of O'Dea (1939), 34 C.A. 2d 179, 93 P.2d 222.... 32
Olivera v. Grace (1942), 19 C.2d 570, 122 P.2d 564, 140 A.L.R. 1328....32, 53

Estate of Palm (1954), 68 C.A. 2d 204, 156 P.2d 62....17, 35
Patterson et al. v. Dickinson et al. (C.C.A. 9, 1912), 193 Fed. 328....17, 29
People v. Agnew (1947), 77 Cal. App. 2d 748, 176 P.2d 724.... 60
Purinton v. Dyson (1937), 8 C.2d 322, 65 P.2d 777, 113 A.L.R. 1230.... 32

Estate of Robinson (1942), 19 Cal. 2d 534, 121 P.2d 734....16, 28

Silva v. Santos (1903), 138 Cal. 536, 71 P. 703.... 32
Simonton et al. v. Los Angeles Trust & Savings Bank, et al. (1923), 192 Cal. 651, 221 P. 368.... 32
Ex parte Smith (1878), 53 Cal. 204....17, 35
Sohler v. Sohler (1902), 135 Cal. 323, 67 P. 282, 87 A.S. 98..18, 32, 39
Stanley et al. v. Westover (1928), 93 Cal. App. 97, 269 P. 468..21, 55
State ex rel. Sparrenberger v. District Court (1923), 66 Mont. 496, 214 Pac. 85, 33 A.L.R. 464....18, 41
Sterling v. Title Ins. & Trust Co. (1942), 53 C.A. 2d 736, 128 P.2d 31....20, 21, 51, 55
Estate of William Stott (1877), 52 Cal. 403.... 36

Pages

Taff v. Goodman (1940), 41 C.A. 2d 771, 107 P.2d 431.....16, 27

United States v. Carter (1910), 217 U.S. 286, 54 L.ed. 769, 30 S. Ct. 515.....20, 53

Estate of Walker (1911), 160 Cal. 547, 117 P. 510, 36 Lns 89.... 32
Walsh v. Majors (1935), 4 C.2d 384, 49 P.2d 598..... 32
Estate of Weed (1898), 120 Cal. 634, 53 P. 30.....16, 27
Wellman v. Security-First Nat. Bank (1951), 108 C.A. 2d 254, 238 P.2d 679.....18, 39
Wickersham v. Comerford (1892), 96 Cal. 433, 31 P. 358..... 32
Wingerter v. Wingerter (1886), 71 Cal. 105, 11 P. 853..... 50
Wolfsen v. Smyth (C.A. 9, 1955), 223 F.2d 111.....19, 41

Zaremba v. Woods (1936), 17 C.A. 2d 309, 61 P.2d 976..... 32

UNITED STATES CODE

U. S. Code, Title 28, Section 1291..... 2
U. S. Code, Title 28, Section 1332..... 1

FEDERAL RULES OF CIVIL PROCEEDURE

Federal Rules of Civil Procedure, Rule 52.....21, 60

CALIFORNIA CODES

Civil Code, Section 2224.....17, 31, 33
Civil Code, Section 2228.....18, 36
Civil Code, Section 2234.....18, 36
Civil Code, Section 3530.....20, 51
Code of Civil Procedure, Section 1963.....20, 52,60
Government Code, Section 244.....16, 26, 58
Health and Safety Code, Section 10,375..... 59
Health and Safety Code. Section 10,575..... 59
Health and Safety Code, Section 10,675..... 59
Penal Code, Section 125.....18, 35, 60
Probate Code, Section 301.....16, 20, 28, 52
Probate Code. Section 302.....16, 28

Pages

Probate Code, Section 440 47
Probate Code, Section 441 8
Probate Code, Section 700 P. 8 ..... 20, 52
Probate Code, Section 600 P. 9 47
Probate Code, Section 701 ..... 20, 52
Probate Code, Section 707 52
Probate Code, Section 1233 ..... 18, 34

MISCELLANEOUS

Comment on Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud (1934-1935), 23 Cal. Law Review 79 ..... 17, 32

Comment on Fraud: Relief in Equity Against Judgments Obtained by Fraud (1920-1921), 9 Cal. Law Review 156 ..... 17, 32

33 CJ 207, Interest, Section 66, note 84 ..... 21, 56

47 CJS 26, Interest, Section 15, Note 16, ... 21, 56

Freeman on Judgments, Section 1235, Vol. 3, page 2575 ..... 18, 39

No. 14,741

In the

United States Court of Appeals

For the Ninth Circuit

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Plaintiff-Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant-Appellee.

Appellant's Opening Brief

This is an action brought by an assignee of a foreign creditor of a decedent seeking to impress a constructive trust upon certain assets of the decedent in the possession of the defendant. The District Court found that there was no basis in law or in fact for directing the establishment of the constructive trust and entered a judgment dismissing the complaint. This appeal is from that decision.

JURISDICTION

Jurisdiction of the District Court is based upon U. S. Code, Title 28, Section 1332, there being diversity of citizenship and requisite amount in controversy (Complaint, Para-

graph 1, R. 3; Findings 1, 2 and 3, Rec. 22). Jurisdiction of this Court over the appeal is based upon U. S. Code, Title 28, Section 1291, the judgment under review being a final decision of a District Court of the United States.

STATEMENT OF THE CASE

This appeal involves the right of a foreign creditor of a decedent to impress a constructive trust upon assets of the decedent in the hands of the administratrix of his estate, who was also an heir and a creditor of the decedent, where the administratrix-heir-creditor probated the estate in a county other than the county in which the decedent resided at the date of his death.

Questions Presented

1. Was the debtor, Edward Cebrian, a resident of the County of Los Angeles or a resident of the City and County of San Francisco on June 6, 1944, the date of his death?

2. If Edward Cebrian was a resident of Los Angeles County on the date of his death, was the action of an administratrix, who was also an heir and creditor of the decedent, in probating the estate of Edward Cebrian in San Francisco and in obtaining the assets of the estate of Edward Cebrian, deceased, without payment of a debt due to a foreign creditor, actual or constructive fraud?

3. If Edward Cebrian was a resident of the City and County of San Francisco on the date of his death, was the action of said administratrix in informing the local registrar that the usual residence of Edward Cebrian was in Los Angeles; in filing with the County Clerk her sworn statement that it was true of her own knowledge that Edward was a resident of Los Angeles County at the date of his death; and in failing to correct said public records actual or constructive fraud?

4. If the answer to either of questions 2 or 3 is in the affirmative, does a court in equity have the power on the instant record to impress a constructive trust and to decree that restitution be made to the creditor of the amount of the debt of the decedent?

5. Does a note which provides for interest "at the rate of six percent per annum from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full" provide for simple interest, or for compound interest?

These questions are raised on the law and on the facts pointed out below in this brief.

The Pleadings

This cause was tried upon a complaint filed by Charles J. Colville (R. 3-8). During the course of the litigation, Charles Colville died and his widow and executrix, Wilma Urch Colville, was substituted as party plaintiff (Finding 1, R. 22).

The complaint alleges that plaintiff is the owner of a certain promissory note executed by one Edward Cebrian, now deceased; that Edward Cebrian, on the date of his death, owed the principal and interest on said promissory note; that Edward Cebrian was a resident of Los Angeles County when he died; that defendant wrongfully probated the estate of Edward Cebrian in the City and County of San Francisco; that the estate should have been probated in Los Angeles County; that plaintiff and his predecessors were deprived of their right to file claims in the proper administration of the estate, i.e., Los Angeles County; and that the acts of concealment and intermeddling pleaded in the complaint were not discovered by the creditor until after May 20, 1950 (R. 3-7).

The complaint asks for judgment against defendant, both individually and in her representative capacity, for the principal of the note and for interest compounded semi-annually (R. 7). A copy of the note is attached to the complaint (R. 7-8).

The answer consists largely of general and specific denials and of affirmative defenses and asks that the complaint be dismissed (R. 8-20). So far as the issues involved in this appeal are concerned, the answer denies that defendant wrongfully probated the estate of Edward Cebrian in San Francisco; alleges that Edward Cebrian was not a resident of Los Angeles County when he died; alleges that plaintiff's claim is barred by his failure to file a claim in the San Francisco probate proceedings; and alleges that plaintiff has no right to impress a constructive trust upon the assets of the estate of Edward Cebrian because of his *laches* (R. 8-20). The pleaded defenses of the statute of limitations and *laches* are not presented for decision on this appeal.

The trial court, by an order for judgment in favor of defendant (R. 21), found for defendant on the issues to be presented by this appeal. The trial court found that defendant "committed no fraud extrinsic in character with respect to the probate proceedings involving the late Edward Cebrian" and that "there is no basis in law or in fact for directing the establishment of a constructive trust." In view of this adjudication, the trial court determined that "there is no occasion to pass upon the applicability of the statute of limitations or the defense of *laches*." (R. 21).

Thereafter the trial court entered findings of fact and conclusions of law (R. 22-31) and final judgment (R. 31-32) accordingly. This appeal followed (R. 32-33).

The Facts

In discussing the facts, we outline primarily those facts as found by the trial court which we do not dispute on this

appeal and which we adopt. We also point out where there are factual disputes and outline the contentions of the parties on these factual disputes. In this Statement of Facts, we discuss the facts chronologically, rather than by subject matter.

In 1928, while in Kentucky, Edward Cebrian, now deceased, made a promissory note (earlier than the one here in dispute) to one John S. Barbee. Barbee, in turn, assigned this note to Van Meter-Terrell Feed Company, a Kentucky corporation, as collateral security for a debt owed by Barbee to said corporation (Finding 6, R. 24).

On November 15, 1932, in renewal of this earlier note (Finding 6, R. 24), Edward Cebrian executed the promissory note in suit—for $10,276.92 plus interest. This note was payable "to the order of John S. Barbee"; was dated at San Francisco; and was negotiable and payable at Lexington, Kentucky (Findings 4 and 5, R. 22-23).

In this note, Edward Cebrian explicitly waived "diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof." (Finding 5, R. 23).

The note provided interest at the rate of 6% per annum "from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full." (Finding 5, R. 23). The question of whether the interest provided by the note is compound interest (Complaint, Prayer for Relief, R. 7) or simple interest was resolved in defendant's favor (Finding 10, R. 25). Plaintiff argues the law on this issue in this brief, pp. 55 to 57.

Edward Cebrian delivered this note to Hugh J. Weldon, an attorney in Santa Barbara who represented John S. Barbee (R. 35-36, Finding 4, R. 22), and Barbee, in turn, delivered the note to Heaney, Price and Postel, also of

Santa Barbara, who were the attorneys for Van Meter-Terrell Feed Company (R. 36; Finding 4, R. 22). When Barbee received this note in November, 1932, he endorsed it in blank and delivered it to Van Meter-Terrell Feed Company (Finding 6, R. 24).

At the time of executing the note, Edward Cebrian was a resident of San Francisco. Edward Cebrian had lived most of his life in the Cebrian family home in San Francisco (Finding 11, R. 25). Edward Cebrian's father, John C. Cebrian, died in 1935 (R. 53) and bequeathed the family home to Ralph Cebrian (R. 53-54), a brother of Edward. Ralph Cebrian, in turn, sold the home to Louis DeL. Cebrian on May 27, 1937 (Plaintiff's Ex. 9, R. 41).

During the period from 1935 to 1938 Edward Cebrian lived at the Cuyama Ranch near Santa Barbara (R. 39, 40, 57, 58, 97 and 98). Thereafter from 1938 to 1944, a period of 6 years, Edward Cebrian lived in Los Angeles (Finding 11, R. 25). While Edward was living at Cuyama Ranch he was a registered voter in Santa Barbara County (Plaintiff's Exhibit 6, R. 38); and while he was living in Los Angeles, he was a registered voter and voted in Los Angeles County (Plaintiff's exhibit 11, R. 42-43).

On or about June 4, 1944, Edward Cebrian died in Los Angeles County (Finding 9, R. 25).

There is a dispute between the parties as to whether Edward Cebrian was a resident of Los Angeles or of San Francisco at the date of his death (Complaint, Paragraph 8, R. 4-5; Answer, Paragraph VIII, R. 11). The trial court did not resolve this fact issue. The evidence bearing on it is discussed in the argument of this brief, pp. 21 to 27.

But whatever might have been his residency, at the date of his death Edward Cebrian still owed the said note dated November 15, 1932, plus interest to John S. Barbee, to Van

Meter-Terrell Feed Company, or to their assignees or successors (Finding 10, R. 25).

On February 9, 1945, eight months after Edward Cebrian's death, defendant executed a petition for probate of the estate of Edward Cebrian for filing in the City and County of San Francisco. This petition alleged that Edward Cebrian died in the County of Los Angeles, but that he was at the time of his death a resident of the City and County of San Francisco (Finding 12, R. 25-26).

On February 9, 1945, also, defendant executed a petition for probate of the estate of Edward Cebrian for filing in the County of Los Angeles. This petition alleged that Edward Cebrian was a resident of the County of Los Angeles at the date of his death (Plaintiff's Ex. 13).

The conflict between the two petitions is illustrated in the side by side comparison of their jurisdictional allegations set forth below:

"* * * Edward Cebrian, also known as Eduardo Cebrian, Edward de Laveaga and Eduardo de Laveaga, died in the County of Los Angeles, State of California, on the 6th day of June, 1944; and was a resident of the said County of Los Angeles, State of California at the time of his death, leaving an estate in said County and elsewhere in the State of California." (Plaintiff's Exhibit 13).

"* * * Edward Cebrian, also known as Eduardo Cebrian and Edward de Laveaga, died in the County of Los Angeles, State of California on the 6th day of June, 1944 and was a resident of the City and County of San Francisco at the time of his d e a t h, leaving an estate in said City and County of San Francisco, State of California." (Plaintiff's Exhibit 21).

In each case, defendant after being sworn said:

"That she is petitioner in the above entitled petition; that she has read the foregoing petition, and knows the

contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on her information and belief and as to those matters she believes it to be true." (Plaintiff's Exhibits 13 and 21).

And both petitions were "subscribed and sworn to" before the same notary public on the same day, to wit February 9, 1945 (Plaintiff's exhibits 13 and 21).

We note that the jurisdictional allegation is not "therein stated on her information and belief."

On February 10, 1945, defendant caused the San Francisco petition to be filed and on February 11, 1945, she caused the notice of hearing said petition to be given, as provided by Section 441 of the Probate Code (Finding 12, R. 25-26).

On February 20, 1945, after filing the San Francisco petition, defendant filed the Los Angeles petition and caused notice of the hearing of this petition to be given, as provided by Section 441 of the Probate Code (Finding 13, R. 26).

On February 26, 1945, the San Francisco Superior Court determined that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and appointed defendant as his administratrix (Findings 11 and 13, R. 25-27). Defendant then abandoned the Los Angeles proceedings (Finding 13, R. 27).

After obtaining probate of the estate of Edward Cebrian in San Francisco, defendant, on February 26, 1945, caused notice to creditors in the matter of the San Francisco proceedings to be published in *The Recorder,* a San Francisco newspaper, as provided by Section 700 of the Probate Code of California (Finding 17, R. 28).

On May 26, 1945, the three-month period for filing an inventory and appraisement provided by the Probate Code, Section 600, expired.

On June 6, 1945, while the six-months period to file claims against the estate was still running, Baylor Van Meter, the sole owner of the aforementioned Van Meter-Terrell Feed Company, died at Lexington, Kentucky; on June 16, 1945, First National Bank & Trust Company of Lexington, Kentucky, was duly appointed the executor of his estate; and on August 24, 1945, the same company was duly appointed trustee of his estate (Finding 7, R. 24).

On August 26, 1945, the six months period of time in which to file claims expired, and no claim was ever filed or presented on the note in suit (Finding 17, R. 28). Indeed, it is conceded that the only persons who filed claims against the estate were Edward Cebrian's brothers and sisters, including the defendant herein (R. 88, 89, 91-94, and 114-115).

Almost three years after the time for filing claims had expired, defendant, on April 1, 1948, filed the inventory and appraisement of all the assets of the Edward Cebrian estate and accounted for such assets in the probate proceedings pending in the City and County of San Francisco (Finding 15, R. 27; R. 114).

Then, on or about May 24, 1950, the First National Bank & Trust Company of Lexington, Kentucky, delivered said note to Charles J. Colville, the original plaintiff herein, and assigned to the said Charles J. Colville all right, title, claim and interest it held in and to said promissory note as executor or trustee of the estate of Baylor Van Meter, deceased, or as both executor and trustee of said estate (Finding 8, R. 24-25).

Defendant has conceded in open court that there are sufficient assets in the estate with which to pay this promissory

note (Typewritten transcript, p. 175, not printed). The exact language appearing in the record is as follows:

> "Mr. Hoppe: But you have filed a paper, have you not, that there are adequate funds to take care of this judgment in case it is entered and you intend to appeal in case it goes against you?
>
> Mr. Sooy: Yes. I believe that is the fact.
>
> * * * * * * *
>
> The Court: Counsel stated you have filed a paper in the probate proceedings setting forth, in the event of judgment herein, satisfaction would be obtained in a certain fashion.
>
> Mr. Sooy: Yes, Your Honor. I naturally reported on litigation, bankruptcy litigation, and this case, Colville versus Koch, in order to justify partial distribution of the estate, which was made last summer, it used a substantial part of the funds. I have explained the value of Caledonia remaining would be sufficient in event the judgment was rendered."

There is a dispute between the parties concerning the propriety of the dual probate proceedings and the obtaining of letters of administration in San Francisco, as distinguished from Los Angeles. With respect to intent of the defendant and injury to the plaintiff, the District Court drew the following fact conclusions:

> "* * * the allegations in the petition for letters of administration filed February 10, 1945, in the Superior Court in and for the City and County of San Francisco, as to the legal residence of Edward Cebrian at the time of his death were true and correct according to the best information and belief of defendant; * * *" (Finding 15, R. 27);
>
> * * * * * * *
>
> "* * * defendant's only reason for filing said petition in Los Angeles County was to avoid delay in the event the San Francisco Superior Court should decide that

Edward Cebrian was a resident of the County of Los Angeles, rather than of the City and County of San Francisco, as she alleged, and if so, it would necessarily follow that it would have decided it had no jurisdiction to appoint defendant as administratrix. In this event, defendant then could and would have proceeded with the probate proceedings instituted by her in Los Angeles County solely to meet that contingency. * * *" (Finding 13, R. 26-27);

* * * * * * *

"* * * no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian." (Finding 20, R. 28);

* * * * * * *

"At no time subsequent to the death of Edward Cebrian did defendant, as an individual or as administratrix of his estate, intermeddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently;" (Finding 14, R. 27);

* * * * * * *

"* * * at no time subsequent to the death of Edward Cebrian, did defendant conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian; * * *" (Finding 15, R. 27); and

* * * * * * *

"* * * no acts of defendant have deprived plaintiff, or her predecessors, of their right to file claims;". (Finding 16, R. 27-28).

These last conclusionary findings are largely in dispute, either as to their factual basis or as to their legal effect.

The incidental facts essential to a complete understanding of the case are discussed in connection with the particular issues to which they appertain, in the argument appearing in following sections of this brief.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to find that Edward Cebrian, at the time of his death, was a resident of the County of Los Angeles, State of California (Finding 11).

2. The District Court erred in finding that the allegations in the Petition for Letters of Administration filed February 10, 1945, in San Francisco, as to the legal residence of Edward Cebrian at the time of his death "were true and correct according to the best information and belief of defendant" (Finding 15).

3. The District Court erred in finding that defendant's only reason for filing a Petition for Letters of Administration in Los Angeles was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of Los Angeles (Finding 13).

4. The District Court erred in determining that defendant could and would have proceeded with the Los Angeles proceedings 'solely' to meet the contingency set forth in Paragraph 3 above (Finding 13).

5. The District Court erred in finding and/or concluding that the Notice of Hearing in the San Francisco petition given by defendant was in the manner required by law (Finding 12 and Conclusion III).

6. The District Court erred in finding that the plaintiff and her predecessors in interest had constructive notice of the hearings on the defendant's petition for letters of administration in the San Francisco Superior Court (Conclusion II).

7. The District Court erred in finding that defendant committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of

Edward Cebrian either in Los Angeles or San Francisco (Conclusion IV).

8. The District Court erred in finding that defendant did not intermeddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently (Finding 14).

9. The District Court erred in finding that no acts of defendant have deprived plaintiff or her predecessors of their right to file claims (Finding 16).

10. The District Court erred in finding that no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian (Finding 20).

11. The District Court erred in concluding that the exclusive jurisdiction to administer the estate of Edward Cebrian was in the San Francisco Superior Court (Conclusion III).

12. The District Court erred in concluding that any suit or action to recover on the note in suit is forever barred by reason of the failure of the holder of said promissory note to file a creditor's claim in probate therein within six (6) months from the date of the first publication of notice to creditors (Conclusion I).

13. The District Court erred in concluding that plaintiff is not entitled by law or under the evidence adduced under trial of this case to a judgment that defendant is a constructive trustee for plaintiff (Conclusion V).

14. The District Court erred in concluding that defendant is entitled to a judgment that plaintiff take nothing by her complaint (Conclusion VII).

15. The District Court erred in failing to enter judgment for plaintiff in the above-entitled action in accordance with

the prayer of relief and in failing to enter findings of fact and conclusions of law consistent with said Prayer for Judgment.

16. The District Court erred in finding that the note in suit provided for 'simple interest' (Finding 10).

17. The District Court erred in finding that all of the facts alleged in plaintiff's Complaint, inconsistent with findings 1 to 17 were untrue (Finding 18).

18. The District Court erred in finding that all the facts alleged in defendant's Answer not inconsistent with findings 1 to 18 were true (Finding 19).

ARGUMENT

As a preliminary to the Argument, we point out that the equities in this case favor the plaintiff and not defendant. The debt upon which the suit was brought was a valid debt at the date of Edward Cebrian's death. It was due and owing at that time. To permit defendant to retain the property of the decedent free and clear of this debt is to permit unjust enrichment. The District Court was of the same view on the equities, as appears from the following comments made during the oral argument:

> "I think it is a case, frankly, that commends itself to adjustment as between the parties if there were assets in the estate to be subjected to matters of claim." (Typed record 248).

It is only because the District Court thought that it lacked the power to grant relief that this matter is here on appeal. The District Court's conviction that it lacked judicial power to grant relief, absent extrinsic fraud, is illustrated by the following remarks addressed to counsel for plaintiff during the course of argument:

> "* * * You will have to admit and concede, I take it, that any matters involved in the proceedings before

> Judge Fitzpatrick and inherent in those proceedings are foreclosed from consideration on my part. * * * What I say from my view in judging the matter and in the light of the law that is Hornbook, you must concede that I am foreclosed unless you can show fraud extrinsic in character. * * * If you dissuade me, I will be promptly reversed by the Court of Appeals. * * * What possible security would there be in a decision of a probate court if I could re-examine at this late date matters that were inherent in that record?" (Typed record, pp. 220-221).

That this was the basis for the result in this case appears from the Order for judgment in favor of defendant, where the Court found (R. 21):

> "* * * defendant * * * committed no fraud extrinsic in character with respect to the probate proceedings * * * and * * * there is no basis in law or in fact for directing the establishment of a constructive trust * * *."

With this preface, we turn to the record and to the law and demonstrate that plaintiff is entitled, both by law and under the evidence, to a judgment that the defendant is a constructive trustee for the plaintiff.

Summary of Argument

I. Edward Cebrian was a resident of Los Angeles County at the time of his death. During the six years he lived there, he proclaimed his Los Angeles residence to his landlady and to the election officials under oath; he voted there; he kept his only personal possessions including family paintings there; and he had no other abode. The contrary evidence at most amounted to proof of a floating intention or desire some day to return to San Francisco to live there and to make it his residence.

Government Code, Section 244;
Bullis v. Staniford (1918), 178 Cal. 40, 46;
Estate of Brady (1918), 177 Cal. 537, 540;
Taff v. Goodman (1940), 41 C.A.2d 771, 775;
Estate of Weed (1898), 120 Cal. 634; and
Estate of Margaret Austin (1879), Myrick, p. 237.

II. By statute, the Cebrian estate should have been probated in the County of Los Angeles. The probate code provides that letters of administration must be granted and administration of estates of decedents must be had in the superior court of the county of which the decedent was a resident at the time of his death, wherever he may have died.

Probate Code, Section 301.

III. An order of the Superior Court granting letters is a conclusive determination of the jurisdiction of the court when it becomes final; and it cannot be collaterally attacked in the absence of fraud in its procurement.

Probate Code, Section 302;
Irwin v. Scriber (1861), 18 Cal. 499, 504;
In re Griffith (1890), 84 Cal. 107;
Holabird v. Superior Court (1929), 101 Cal. App. 49;
Estate of Robinson (1942), 19 Cal. 2d 534; and
Estate of Crisler (1948), 83 C.A.2d 431.

But a suit to review a judgment for fraud or mistake is a direct proceeding against such judgment and not a collateral attack.

Bacon v. Bacon (1907), 150 Cal. 477, 486; and
Caldwell v. Taylor (1933), 218 Cal. 471, 475.

IV. Equity has power to grant relief from a probate judgment wrongfully obtained and to deprive a party of the benefit of the wrongfully obtained judgment.

Civil Code, Section 2224;

Patterson et al v. Dickinson et al. (C.C.A. 9, 1912), 193 Fed. 328, 333;

Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717;

Diamond v. Connolly (C.C.A. 9, 1918), 251 Fed. 234, 240-241;

Arrowsmith v. Gleason (1889), 129 U.S. 86, 101;

Estate of Hudson (1883), 63 Cal. 454, 457;

Comment on *Fraud: Relief in Equity Against Judgments Obtained by Fraud* (1920-1921), 9 Cal. Law Review 156;

Comment on *Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud* (1934-1935), 23 Cal. Law Review 79; and

Cases cited at page 32 of the argument.

V. A fraudulent intent is not an essential element to impress a constructive trust under the "extrinsic fraud" rule.

Diamond v. Connolly (C.C.A. 9, 1921), 276 Fed. 87, 91, 92; and

Cardozo v. Bank of America (1953), 116 C.A.2d 833, 837.

VI. One element warranting relief is that defendant was a fiduciary for the creditors of the decedent as well as for his heirs.

Curtis v. Schell (1900), 129 Cal. 208, 215;

Magraw v. McGlynn (1864), 26 Cal. 420, 429;

Ex parte Smith (1878), 53 Cal. 204, 208; and

Estate of Palm (1945), 68 C.A.2d 204, 211.

As a fiduciary, defendant had the duty to make a full disclosure to the superior court of all the evidence upon which the determination of residency should have been made. She did not do so. Her failure to do so is a fraud for which equity may afford relief whether such fraud be regarded as extrinsic or, as an exception to the extrinsic fraud rule.

Probate Code, Section 1233;
Penal Code, Section 125;
Civil Code, Section 2228;
Civil Code, Section 2234;
Laun v. Kipp (1914), 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655, 670;
Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717, 718;
Larrabee v. Tracy (1943), 21 C.2d 645, 651;
Wellman v. Security-First Nat. Bank (1951), 108 C.A. 2d 254, 267;
Sohler v. Sohler (1902), 135 Cal. 323, 327; and
Freeman on Judgments, Section 1235, Vol. 3, pp. 2575-2577.

VII. A further extrinsic factor is that the erroneous testimony of defendant concealed from the Superior Court facts affecting its own jurisdiction. The concealment of jurisdictional facts is a fraud on the court.

Miller v. Higgins (1910), 14 C.A. 156, 162;
McGuinness v. Superior Court (1925), 196 Cal. 222, 226;
State ex rel. Sparrenberger v. District Court (1923), 66 Mont. 496, 214 Pac. 85, 33 A.L.R. 464, 466; and
Crow v. Crow (1914), 74 Okla. 455, 139 Pac. 122.

VIII. Another extrinsic factor is that the proceedings to determine jurisdiction were *ex parte* and there was no adversary trial or decision on the issue of residence.

Wolfsen v. Smyth (C.A. 9, 1955), 223 F.2d 111, 113;
Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 718;
Kasparian v. Kasparian (1933), 132 Cal. App. 773, 781-782;
Bacon v. Bacon (1907), 150 Cal. 477, 492;
Curtis v. Schell (1900), 129 Cal. 208, 215; and
Dunlap v. Steere (1891), 92 Cal. 344, 348.

IX. Still another extrinsic factor is that abundant public records in Los Angeles County proclaimed that Edward Cebrian was a resident of Los Angeles County. As a result, the San Francisco proceedings were contrary to a logical conclusion to be drawn from the information given by these public records.

Adams v. Hackensack Trust Co. (1945), 156 Fla. 20, 22 So. 2d 392, 395-396; and
Monk v. Morgan (1920), 49 Cal. App. 154.

X. The Caledonia Farms arrangement was an additional extrinsic factor. Under this arrangement, Edward Cebrian was a secret beneficiary of a trust of valuable farm lands once owned by him. This arrangement was consummated in 1935 and was not made a matter of public record any place until 1948, long after creditors would have had any interest in any probate proceedings. In the interim in 1935 and again in 1938, plaintiff's precedessor had unsuccessfully sought to locate assets belonging to Edward Cebrian. If these assets had been openly avowed, it is manifest that all creditors of Edward Cebrian would have watched his status carefully.

XI. The defense that plaintiff had constructive notice of the San Francisco proceedings is unsound on three separate bases.

First, constructive notice is no defense in an equitable action of this type, particularly where the only notice is by newspaper publication.

Bergin v. Haight (1893), 99 Cal. 52, 56; and
Dunlap v. Steere (1891), 92 Cal. 344, 349.

Second, plaintiff was not bound to know anything of the San Francisco proceedings because the facts giving jurisdiction did not exist.

Beckett v. Selover (1857), 7 Cal. 215, 236-237.

Third, plaintiff's predecessor was a resident of Kentucky at the time the notices to creditors were published. As a matter of law, there was no constructive notice of the proceedings.

Sterling v. Title Ins. & Trust Co. (1942), 53 C.A. 2d 736, 749; and
Civil Code, section 3530.

XII. The law will presume a causal relationship between the wrongful probate of the estate in San Francisco and the failure of the creditor to file a claim. Indeed, even in the absence of such a presumption, it is not necessary for a plaintiff to show he has sustained any loss by reason of the wrongful conduct of a fiduciary.

Probate Code, Section 301(1);
Probate Code, Section 700;
Probate Code, Section 701;
Code of Civil Procedure, Section 1963, para. 4;
Beckett v. Selover (1857), 7 Cal. 215, 237;
United States v. Carter (1910), 217 U.S. 286, 305;
Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, 717.

XIII. The failure of plaintiff to file a claim does not bar the action. This failure did not operate as an extinguishment of the debt and a court is still free to award equitable relief.

Stanley et al v. Westover (1928) 93 Cal. App. 97, 110; and

Adams v. Hackensack Trust Co. (1945) 156 Fla. 20, 22 So. 2d 392.

Cf. *Sterling v. Title Ins. & Trust Co.* (1942) 53 C.A. 2d 736, 749.

XIV. The note in suit provides that interest is payable at maturity and thereafter semi-annually until paid in full. This language manifested an express intent to provide for compound interest.

Ashford v. Traylor (1931) 43 Ga. App. 507, 159 S.E. 777; 33 C.J. 207, *Interest,* Section 66, Note 84; and 47 C.J.S. 26, *Interest,* Section 15, Note 16.

XV. The findings of fact do not warrant a deviation from the foregoing rules of law and may be permitted to stand. But even if they did support a contrary conclusion, the disputed findings of fact are clearly erroneous because they are without record support. And, findings 18 and 19 do not support this judgment. Because of their generality they do not comply with Rule 52 of the Rules of Civil Procedure.

XVI. Plaintiff asks that the judgment of the District Court be reversed with instructions to consider the applicability of the statute of limitations and the defense of laches and to enter judgment for plaintiff in the event the District Court determines that defendant has not sustained said defenses.

So much of the statutes and rules cited in the argument as may be deemed necessary to the decision of the case is printed at length in an appendix accompanying this brief.

Edward Cebrian Was a Resident of Los Angeles

A crucial fact question on this appeal is whether Edward Cebrian, at the time of his death, was a resident of Los

Angeles County, or, a resident of the City and County of San Francisco. Plaintiff submits that she was entitled to a finding in her favor on this issue. The trial court failed to resolve this fact issue. Our first specification asserts error in failing to find that Edward Cebrian was a resident of Los Angeles County at the date of his death.

The evidence on this question is not in substantial conflict and we believe that it clearly establishes the Los Angeles residency which we urge. We concede that Edward Cebrian once was a resident of San Francisco and that this status continued until some time in 1934. Up to that time, Edward Cebrian apparently considered the old family homestead at 1801 Octavia Street to be his residence. This brief, therefore, discusses the occurrences taking place subsequent to that date to show that a change in residency in fact occurred.

In 1934, Edward Cebrian was the owner of a 44,000-acre ranch in the counties of San Luis Obispo and Santa Barbara. This ranch is called Rancho Cuyama. In 1934, Rancho Cuyama was subject to a $450,000.00 mortgage, which was then in default (R. 57, 58, and 97).

On August 21, 1934, Edward Cebrian filed proceedings in Los Angeles for a composition or extension of creditors under the then Sections 75a to r of the Federal Bankruptcy Act (R. 90).

On January 17, 1935, said proceedings were dismissed (R. 91) and Edward obtained a three-year lease of Rancho Cuyama with an option to purchase it from the bank (R. 58). Edward Cebrian, together with the defendant in this action and Edwin Koch, her husband, moved to Rancho Cuyama (R. 39, and 97).

Edward lived at Rancho Cuyama under the lease from 1935 to 1938 (R. 39). In 1938, Edward lost his rights in Cuyama Ranch (R. 59). Edward then moved to Los Angeles

and stayed in Los Angeles until the date of his death on June 6, 1944 (R. 40, 41, and 42).

While Edward was living at Rancho Cuyama, his father, John C. Cebrian, died in Madrid, Spain, in the year 1935 (R. 53). Edward's mother already was dead, having died in 1920 (R. 52).

As a part of the settlement of his father's estate, Edward received two of the paintings which the family had considered to be old masters (R. 50, 68, 69) and nothing more.

John Cebrian bequeathed the family homestead to Ralph Cebrian (R. 53-54) and Ralph thereafter referred to the homestead as "my residence." (R. 66).

Also, while Edward was living at Rancho Cuyama, Ralph Cebrian, in 1935, closed up an office which Edward and Ralph had maintained in San Francisco for many, many years (R. 57, 65, 66).

Thus by 1936, the family homestead had been transferred from father to brother and the San Francisco office had become a thing of the past. Edward then, on July 13, 1936, became a registered voter on the Great Register of Santa Barbara County (Plaintiff's Ex. 6, R. 38). We can infer that Edward Cebrian did not make this step thoughtlessly, for earlier, in 1930, when San Francisco had indisputably been Edward's residence, he insisted that he be included in the census in this city, although he was then located in Kentucky (R. 65).

For a period of time after the death of John Cebrian, Ralph Cebrian retained the old family home. During this period, Edward continued to maintain three rooms under lock and key in which he stored his photographic equipment and in which he stored records which had been removed from the old office (R. 53, 66, 85). During this period also, while Edward was staying at the Palace Hotel, he would

have his personal laundry done at the Octavia Street home (R. 81-82).

Then Ralph Cebrian transferred the home to Luis DeL. Cebrian in satisfaction of a debt (R. 54). Although Ralph Cebrian's oral testimony placed this date as March 19, 1938 (R. 54), the contemporaneous documentary evidence shows that the deed was dated May 17, 1937 (Plaintiff's Ex. 9, R. 41).

After Ralph disposed of the old homestead, Edward went through the home and removed his personal belongings (R. 55, 85) and Ralph destroyed the old office files (R. 66). This destroyed Edward's last physical tie to San Francisco.

During the years from 1935-1938 Edward made many "business trips" trying to build up a business to save the ranch (R. 97-98). On some of these trips Edward came to San Francisco, where he stayed at the Palace Hotel (R. 55, 99).

Edward then lost all hope of retaining the ranch and left it in March or April of 1938 (R. 98). After Edward left, Hibernia Bank put some tenants in on a share basis and defendant and Mr. Koch stayed on until November to look after the interests of the bank (R. 98).

Edward, however, was still interested in saving the ranch and tried to interest people in buying it. He went to Los Angeles, Santa Barbara and San Francisco (R. 98). As pointed out, he stayed at the Palace Hotel when he was in San Francisco on these trips.

It does not appear that Edward Cebrian ever maintained a permanent room at the Palace Hotel or that he ever considered the hotel to be his residence.

The last time Edward was seen in San Francisco was in the fall of 1938. Ralph Cebrian saw him on the street (R. 55) at which time Edward complained that "our sister Isabelle wanted him to move down to Los Angeles" (R. 56).

Edward said he would like to remain in San Francisco (R. 56), but Isabelle told him if he moved down to Los Angeles, she would do her best to help him live (R. 56).

In October of 1938, Edward Cebrian removed from Cuyama to Los Angeles County (R. 42, Plaintiff's Ex. 11). Thereafter, in and about November, 1938, defendant and her husband left Rancho Cuyama and moved to the Fairmont Hotel in San Francisco (R. 98-99). When defendant came to the Fairmont, Edward had already moved to Los Angeles (R. 41, 99).

For awhile, Edward's "first residence down there was with some friend that had a sort of guest house" (R. 100).

Then, on October 1, 1939, Edward rented an apartment at 1549 Northwestern Avenue in Los Angeles (Plaintiff's Ex. 10, R. 42). Edward told his landlady, Mrs. Melcher, that it was his intention to become a permanent tenant and to make the apartment his permanent home (R. 42). Upon rental, Edward promptly moved into this apartment and took in with him his bookcase, his books, his stamp collection, his pictures and his clothing, and he never left the premises until the date of his death on June 6, 1944 (Plaintiff's Ex. 10, R. 42).

While Edward was living in Mrs. Melcher's apartment house, he, on March 20, 1940, became a registered voter in Los Angeles County. Under oath Edward Cebrian said that he was a resident of Los Angeles County residing at 1549 Northwestern Avenue (Plaintiff's Ex. 11, R. 42-43).

After becoming a registered voter, Edward voted at Los Angeles in the general elections of 1940 and 1942 (Plaintiff's Ex. 11, R. 42).

Then on June 6, 1944, Edward died at Los Angeles. It is most clear that during the entire period of time commencing when Edward moved to Los Angeles until he died

there that he had never left the Los Angeles area (R. 42, 89, 100-101).

At the date of his death, Edward still had at his apartment his books and family paintings (R. 49). Defendant sold some of the books and brought the balance of the personal belongings from Los Angeles to San Francisco when she cleaned out the apartment (R. 49).

By statute, Government Code, Section 244, a residence: "is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose." There can be little doubt that Edward's apartment in Los Angeles meets that statutory definition.

There is some evidence that Edward was unhappy in Los Angeles and that he wanted to make his residence in San Francisco. But he never did so. Such evidence is found in recollections of letters and conversations in which Edward is reputed to have said the following:

> "* * * he was unhappy in Los Angeles and wanted to return to San Francisco." (R. 102);
>
> * * * * * * *
>
> "* * * he wanted to return to San Francisco and make his residence here." (R. 102); and
>
> * * * * * * *
>
> "* * * he wanted to make San Francisco his home." (R. 105).

His reputed desire to return to San Francisco and "to make" his residence here was ineffective to change his residence from Los Angeles to San Francisco. This, because "Residence can be changed only by the union of act and intent." (Government Code, Section 244 (g)). In the case at bar there was no act making San Francisco his residence. In fact, he had no place to go in San Francisco, his family

home having been sold and his relatives having been unable to find suitable quarters for him elsewhere.

In addition, the common law of California establishes Los Angeles residency. For example, in *Bullis v. Staniford* (1918), 178 Cal. 40, the Court discussed the question of residency in proceedings to set aside a fraudulently declared homestead. Staniford lived at Fresno. In 1912 he went to Los Angeles; he registered as a voter in Los Angeles; and he voted at all regular elections in that city. The Court pointed out that his registration was supported by affidavits solemnly alleging that his residence was in Los Angeles. He also testified in a court action that his residence was in that city. The Court disposed of contrary evidence similar to that in the case at bar as follows, p. 46:

> "* * * At most his testimony amounts to proof of a floating intention some day to return to Fresno to live, and this as against the solemn, undisputed evidence of facts establishing his residence in Los Angeles is negligible."

And *In Estate of Brady* (1918), 177 Cal. 537, states, p. 540:

> "* * * The presumption that a person is innocent of crime is very strong, and it is not to be assumed, in the absence of substantial evidence of the fact, that Brady committed perjury in making his affidavits of registration. The fact that his original place of residence was San Francisco is of no force to raise the presumption that it continued to be there after the year 1914, as against the positive evidence that in that year he deliberately changed it to the city of Ross."

Other cases to the same effect include:

Taff v. Goodman (1940), 41 C.A.2d 771, 775;
Estate of Weed (1898), 120 Cal. 634; and
Estate of Margaret Austin (1879), Myrick, pg. 237.

By Statute the Cebrian Estate Should Have Been Probated in Los Angeles County

It has been shown in a prior section of this brief that Edward Cebrian was a resident of the County of Los Angeles at the date of his death. The California statute (Probate Code, Section 301(1)) specifically provides that letters of administration "must be" granted and that administration of estates "must be" had in the Superior Court of the County in which the decedent was a resident at the time of his death.

The statute made it the duty of the defendant to probate the estate in Los Angeles and not to probate it in San Francisco. By her actions, defendant obtained probate of the estate in San Francisco rather than in Los Angeles.

Thus defendant has obtained custody of all of the assets of Edward Cebrian, whereas probate should have been lodged in an officer of the court in Los Angeles.

But can relief be awarded because of this factor?

Collateral Attack on Judgment Not Available as Remedy

The law in California is quite clear that plaintiff would not be justified in making a collateral attack upon the order granting letters in the absence of fraud in its procurement. The Probate Code, Section 302, provides:

> "302. * * * In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

And the cases, with unanimity, refuse to upset a probate judgment on the ground that it was wrongfully obtained. Examples of cases so holding include such authorities as:

Irwin v. Scriber (1861), 18 Cal. 499, 504;

Estate of Robinson (1942), 19 C.2nd 534;

Estate of Crisler (1948), 83 C.A. 2nd 431;
In re Griffith (1890), 84 Cal. 107; and
Holabird v. Superior Court (1929), 101 C.A. 49.

Therefore, if plaintiff had sought to set this prior decree aside, it is clear a roadblock would have been met at the outset. However, the circumstance that plaintiff would be unable to set this prior decree aside did not preclude the trial court from granting equitable relief.

The Court so said in *Bacon v. Bacon* (1907), 150 Cal. 477:

> "* * * a suit to review a judgment for fraud or mistake is a direct proceeding against such judgment and not a collateral attack" (150 Cal. 486).

We particularly note that the thing which cannot be collaterally attacked is the jurisdiction of the superior court and that the statute does not say that the place of residence shall not be contested in any other proceeding.

Equity Has Power to Grant Relief from Judgment

The power of a federal District Court sitting in equity to grant equitable relief against an otherwise binding probate judgment is well established.

In this Circuit, the earliest case appears to be *Patterson et al. v. Dickinson et al.* (C.C.A. 9, 1912), 193 F. 328. In that case, an heir brought an action to seek equitable relief from a probate judgment and, as in the case at bar, the District Court thought it was without power to grant the relief sought. In reversing the lower court and in overruling a demurrer, this Court said (pg. 333):

> "* * * We may concede that upon the allegations of the bill in this case the court below had no authority to set aside the decrees of the superior court of Los Angeles county in admitting the will to probate and distributing the estate, and such is not the object of the bill. It is to declare the appellee a trustee of the property which he

has inequitably obtained, and its jurisdiction to do so rests upon principles as old as equity itself."

Hewitt v. Hewitt (C.C.A. 9, 1927), 17 F.2d 716, states, p. 717:

> "It is well settled that a court of the United States, in the exercise of its equity powers and where diversity of citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment or decree fraudulently obtained in a state court, as the decree of the federal court operates on the parties, and not on the state court. * * *"

Diamond v. Connolly (C.C.A. 9, 1918), 251 Fed. 234, 240-247, is in accord.

And in *Arrowsmith v. Gleason* (1889), 129 US 86, a minor, upon majority, brought an action in a state probate court to have proceedings instituted by his guardian set aside as being void. The Ohio state courts held that the proceedings complied with the provisions of the Ohio law and refused to annul the prior decree. This earlier decision is reported in *Arrowsmith v. Harmening,* 42 Ohio St. 254. This decision therefore became final. The plaintiff then commenced an independent action in the federal court for the northern district of Ohio. The federal court dismissed the action and on appeal from this latter decision the United States Supreme Court reversed. In reversing, it said, p. 101:

> "These principles control the present case which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction

> of the circuit court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

The foregoing cases parallel the California Civil Code, Section 2224:

> "2224. (Involuntary trust resulting from fraud, mistake, etc.) One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

One of the first expressions of the California rule is found in *Estate of Hudson* (1883), 63 Cal. 454. In that case, petitioners sought to have a decree of distribution and discharge set aside because of fraud and because the Court had been imposed upon by false testimony. The Court held that a probate court has no jurisdiction to entertain such a petition because the decree of final distribution was final. The Court then went on to say (page 457):

> "* * * In such cases, courts of equity have jurisdiction to afford proper relief; and if it be true that, by means of false testimony, the Probate Court was imposed upon, and induced to make a decree which it would not otherwise have made, doubtless a court of equity can charge the distributees as trustees."

From that beginning, equitable relief has been common in the California decisions where a final judgment has been

obtained through varying forms of fraud, accident, mistake or other wrongful act. Examples include the following:

Wickersham v. Comerford (1892), 96 Cal. 433, 439-440;

Curtis v. Schell (1900), 129 Cal. 208, 215;

Sohler v. Sohler (1902), 135 Cal. 323, 330-331;

Silva v. Santos (1903), 138 Cal. 536, 542;

Bacon v. Bacon (1907), 150 Cal. 477, 486-487;

Campbell-Kawannanakoa, et al. v. Campbell (1907), 152 Cal. 201, 208-209;

Estate of Walker (1911), 160 Cal. 547, 548-549;

Simonton et al. v. Los Angeles Trust & Savings Bank, et al. (1923), 192 Cal. 651, 655-658.

McGuinness v. Superior Court (1925), 196 Cal. 222, 230;

Caldwell v. Taylor (1933), 218 Cal. 471;

Walsh v. Majors (1935), 4 C.2d 384, 395-397;

Purinton v. Dyson (1937), 8 C.2d 322, 325-327;

Olivera v. Grace (1942), 19 C.2d 570, 575-576;

Larrabee v. Tracy (1943), 21 C.2d 645, 651;

Monk v. Morgan (1920), 49 Cal. App. 154, 159-163;

Kasparian v. Kasparian (1933), 132 Cal. App. 773;

Zaremba v. Woods (1936), 17 C.A. 2d 309, 318-319;

Estate of O'Dea (1939), 34 C.A. 2d 179, 181;

Cardozo v. Bank of America, etc. (1953), 116 C.A. 2d 833, 837-840.

Excellent review notes on the status of the California law on the entire subject are found in a comment, *Equitable Relief from Judgments, Orders and Decrees Obtained by Fraud* (1934-1935), 23 Cal. Law Review 79; and a comment *Fraud: Relief in Equity Against Judgments Obtained by Fraud.* (1920-1921) 9 Cal. Law Review 156.

With this preliminary discussion, we turn to the view of the District Court that extrinsic fraud was here lacking.

Under California Law, a Fraudulent Intent Is Not an Essential Element to Impress a Trust.

It will be noted that the trial court was of the view that relief could not be granted because there was no showing of "fraud extrinsic in character" (R. 21). It will be observed that Civil Code Section 2224 does not except intrinsic fraud or constructive fraud from its operation.

Findings 13, 14, 15 and 20 (R. 26-28) and Conclusions IV and V (R. 30) in whole, or in part, are directed to defendant's intent. Specifications 2, 3, 4, 7, 8, 10 and 13 assert error in this regard. This section of the brief urges that intent to commit a fraud is not an essential element in a constructive trust case.

Quite recently, in *Cardozo v. Bank of America* (1953), 116 C.A. 2d 833, the trial court and the reviewing court both found an absence of intent or actual fraud (p. 837). Even so the reviewing court granted equitable relief because of constructive fraud in connection with a decree of distribution. The Court said, p. 837:

> "* * * Regardless of the reasons and of her lack of intent to defraud, her failure * * * (to give an heir notice of the probate proceedings) and her obtaining an undue advantage of him by her erroneous petition for distribution constituted a constructive fraud. As executrix it was her duty to notify him of the probate proceedings."

And at page 839, the Court said further:

> "* * * The fact that she did not intend to defraud him is not important. He was just as defrauded as if she had intended to defraud him."

Earlier, in a case involving Idaho law (which appears to be not unlike California law on this issue), this Court in *Diamond v. Connolly* (C.C.A. 9, 1921) 276 Fed. 87, said:

> "* * * Upon the evidence the Court below reached the conclusion that there was no fraud upon the part of the administrator, and gave judgment for the defendants." (p. 91).
>
> * * * * * * *
>
> "The learned judge seems from his opinion to have attached great importance to the testimony given on behalf of the defendants, to the effect that the administrator did not know and had never heard of the existence of Celia Diamond or Bridget McGrail prior to the entry of the decree of distribution." (p. 92).

Nevertheless, this Court granted equitable relief from the judgment because the plaintiffs had been deprived of their right to share in the proceeds of the estate.

Therefore, we conclude that the District Court committed error in finding that "extrinsic fraud" and intent are essential elements to an equitable action for relief from a judgment.

The Testimony of the Administratrix Warranted Relief

We believe that constructive fraud in the case at bar is established by the defendant's petition in probate. As shown, this petition states "of her own knowledge" that Edward "was a resident of the * * * County of Los Angeles * * * at the time of his death." (Plaintiff's Exhibit 13.) By statute, Probate Code, Section 1233, the probate court was required to receive this verified petition in evidence. The trial court did not find that the jurisdictional statement was true, but found only that it was "true and correct according to the

best information and belief of defendant." (Finding 15, R. 27). Our Penal Code Section 125 provides:

> "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false."

But even if this were not so, the admitted testimony of defendant given at the hearing was so deficient with respect to the jurisdictional facts that it was constructive fraud on the creditors and in a sense both intrinsic and extrinsic.

The sole testimony supporting the decree of the Superior Court is that of defendant. By her testimony, defendant was appointed administratrix of the estate. Further, defendant was a creditor of the estate and also was an heir of the decedent. As a consequence, she was in a position where she would be greatly benefitted if creditors were left unaware of their right to file claims. Irrespective of her good faith and honesty, defendant had a duty to see to it that all creditors of the estate received equal and proper notice of the probate proceedings.

California law leaves no doubt that an administrator is a fiduciary for the creditors of a decedent. This rule is announced in *Curtis v. Schell* (1900), 129 Cal. 208, where it was stated, page 215, that an executrix "is a trustee to protect the interests of creditors."

Other cases to the same effect include:

Magraw v. McGlynn (1864) 26 Cal. 420, 429;
Ex parte Smith (1878) 53 Cal. 204, 208; and
Estate of Palm (1945), 68 C.A. 2d 204, 211.

As a fiduciary, defendant had the statutory duty not to obtain any advantage over the creditors by "the slightest * * * concealment * * * of any kind." (Civil Code, Section

2228). Any advantage which she might have obtained by violation of the foregoing section is a constructive fraud against the creditors (California Civil Code, Section 2234.)

And this is true even if there be an absence of intent to defraud. *Estate of William Stott* (1877), 52 Cal. 403, 406; and *Cardozo v. Bank of America* (1953), 116 C.A. 2d 833, 837.

We examine the record and it clearly demonstrates that essential facts bearing on residency were concealed from the state court. The sum total of the evidence which defendant gave appears at pages 48 and 49 of the record. Its full analysis discloses the following deficiencies:

First, defendant testified that she "filed them in Los Angeles." This was accurate, but failed to specify that, in her petition, she stated under oath that Edward Cebrian was a resident of Los Angeles County.

Second, defendant testified that Edward was born in San Francisco and that his schooling centered in the Bay Area. This statement was accurate.

Third, defendant testified that Edward's family home was here. This statement inaccurately omits the critical fact that his family home was here until 1935, when it was bequeathed to Ralph Cebrian, or at the very latest until 1938, when Ralph Cebrian conveyed it out of the family.

Fourth, defendant testified that Edward "always" wanted to live here. This statement is inaccurate. The only times shown in this record that he wanted to live here were in 1938, before he made the move, and subsequently, after his residency had in fact been changed. In the interim he had told Mrs. Melcher that he wanted to live permanently in her apartment and he had sworn that his residence was in Los Angeles when he registered to vote.

Fifth, defendant testified that Edward would "always" come back home and that he was living "temporarily" in Los Angeles. This was inaccurate. The facts were that Edward Cebrian had not come back to San Francisco anytime during the period from 1938 to 1944.

Sixth, defendant testified that Edward was living in Los Angeles because "he was able to find a job in Los Angeles, whereas here he had not been able to find one". That was incomplete. The testimony shows that Edward moved to Los Angeles because defendant told him to move there and get away from his friends or she would no longer support him (R. 56, 102, 103).

Seventh, defendant failed to testify that when Edward moved to Los Angeles he took with him his only possessions —to-wit, his books and paintings and that those possessions were still in his apartment at the date of his death.

Eighth, defendant failed to testify that Edward Cebrian had registered in Los Angeles and had voted there in two general elections.

Ninth, defendant failed to testify that Edward's death certificate showed that his usual residence was in Los Angeles.

If all these facts had been pointed out to the Superior Court, it is a foregone conclusion that it would have held that residency in fact existed in Los Angeles County.

Since defendant did not testify as to all these facts, it necessarily follows that she obtained probate because of her incomplete testimony.

These factors establish either an extrinsic factor under the rule, or an exception to the extrinsic factor rule.

In *Laun v. Kipp* (1914), 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655, the applicable rule is stated as follows, 5 A.L.R. 670:

"* * * In ordinary situations one may, legally if not morally, keep silent and profit by his adversary's ignorance. That is neither fraud intrinsic, as in the case of perjury, nor fraud extrinsic, within the Throckmorton rule. But where there is a solemn duty to speak, independently of coercion, and in a judicial controversy as well, whether asked to speak or not, and there is a failure to speak, resulting in the enrichment of the wrongdoer and the impoverishment of the one to whom that duty is owing, there is a fraud of most serious nature, and, in a sense, both intrinsic and extrinsic."

This Court has applied the rule of the *Laun* case in *Hewitt v. Hewitt* (C.C.A. 9, 1927), 17 F.2d 716. There the widow of a decedent probated his estate without giving notice of the probate proceedings to an adopted child of the decedent. The petitions for probate and distribution made no reference that the decedent had an heir or that the heir ever existed. Plaintiff brought an action for equitable relief asking that defendants be declared trustees for his share of the estate. The District Court denied relief and on appeal this Court reversed with directions. The Court said:

"Here, by reason of the trust and confidential relation existing between the parties, a positive duty rested on the administratrix to fully advise the court as to all facts and all information in her possession concerning the heirs of the decedent and their whereabouts. This duty she wholly failed to discharge, and the reason for her failure cannot be accepted. * * *." (p. 717)

"* * * She made no inquiry for the adopted son, at his last known place of address or elsewhere, and maintained silence solely because of the hearsay statement made to her by her husband some years before. Had she communicated all of these facts to the court, it is not at all likely that a decree of distribution would have been entered without directing further investigation or

inquiry—at least we have a right to so presume. Nor will we speculate as to what might have happened, had she pursued the proper course." (p. 717)

"This case, we think, falls within the exception, and not within the general rule. Here the appellant was prevented from presenting a claim for his portion of the estate by the fraudulent conduct of the administratrix, and there has been no adversary trial or decision of any issue as between the parties to the present suit. The appellees frankly concede that, if the appellant had been prevented from making claim to the estate because of some fraudulent statement or misrepresentation on the part of the administratrix, a court of equity would readily grant relief; but it is contended that mere silence on her part presents an entirely different question. But there can be no sound distinction between the giving of false information and the failure to give correct information where the giving of the latter is a matter of legal duty. * * *". (p. 718)

And our California courts have applied the same rule in *Larrabee v. Tracy* (1943), 21 C.2d 645, 651 (quoting the rule from *Freeman on Judgments,* section 1235, volume 3, pp. 2575-2576); and *Wellman v. Security-First Nat. Bank* (1951), 108 C.A. 2d 254, 267. Cf. *Sohler v. Sohler* (1902), 135 Cal. 323, 327.

Jurisdictional Factor Is Extrinsic

Another exceptional factor which is extrinsic in the case at bar is that the question decided went to the jurisdiction of the court. If the court had known that Edward's residence was in Los Angeles—it is manifest that it would not, and could not, have assumed jurisdiction of Edward's estate.

For example in *Miller v. Higgins* (1910), 14 C.A. 156 there were two contemporaneous adoption proceedings.

Under the statutes, the first filed case created exclusive jurisdiction in that court. However, defendant conducted adoption proceedings in the second filed case without telling the court about the earlier proceeding. At page 162 the court said:

> "The record discloses that the fraud practiced upon the court making the order of adoption in this case was the concealment from the court of facts affecting its jurisdiction. It is unnecessary to cite authorities in support of the proposition that when a court competent to adjudicate upon the subject matter of the litigation obtains jurisdiction over the parties, within the territorial limits of its extent, such court alone has the power to adjudge upon the questions sought to be litigated in the suit, and no other court can deprive it of that power. The court finds, and it is most evident, that but for the concealment of the facts referred to it would not have made this decree of adoption in the first instance. Such concealment of facts affords ground for relief in equity. (1 Bigelow on Fraud, p. 92.) It is clear that the parties to the adoption proceedings concealed from the superior court the facts relative to the action of the superior court of Contra Costa county, and upon which facts the jurisdiction of the superior court of Los Angeles county depended. This was a fraud upon the court. (*Dunham v. Dunham,* 162 Ill. 589, (44 N.E. 841.))"

Relief was given in *McGuinness v. Superior Court* (1925), 196 Cal. 222, 230:

> "* * * It was also extrinsic fraud in so far as the court itself granting such decree was concerned since it was effected through concealment from the court in an ex parte proceeding of facts which the defendant in said action was bound to disclose and which if disclosed would have rendered improper the granting and impossible the procurement of such final decree."

Similarity in *State Ex Rel. Sparrenberger v. District Court* (1923), 66 Mont. 496, 214 Pac. 85, 33 A.L.R. 464, a husband obtained jurisdiction in a divorce proceeding by misrepresenting the residence of his wife. At 33 A.L.R. 466 the Court said:

> "Fraud being the arch enemy of equity, a judgment obtained through fraud practised in the very act of getting it will be set aside by a court of equity upon seasonable application. Indeed, the power of a court of equity to grant such relief is inherent. *Clark v. Clark,* 64 Mont. 386, 210 Pac. 93; 15 R.C.L. 760, 762. The conscience of the chancellor moves quickly to right the wrong, when it is shown that through imposition practised upon the court by a litigant an unfair advantage has been gained by him, and thus it has been made an instrument of injustice. 15 R.C.L. 761; *Dowell v. Goodwin,* 22 R.I. 287, 51 L.R.A. 873, 84 Am. St. Rep. 842, 47 Atl. 693."

Crow v. Crow (1914), 74 Okla. 455, 139 Pac. 122 is in accord.

The Ex Parte Nature of the Hearing Was Extrinsic

Another independent concept making the instant mistake or fraud extrinsic is the fact that it arose in an *ex parte* proceeding.

In the case at bar, there was no contest as to the fact of residency and it cannot be said realistically that the Court considered that there was a fact dispute. Defendant testified in favor of the San Francisco residency and there were present at the hearing only her sister and her attorney (Defendant's exhibit B, page 15). Here the factor making the judgment inequitable has taken place in a non-adversary proceeding. *Wolfsen v. Smyth,* (C.A. 9, 1955) 223 F.2d 111, 113.

The non-adversary nature of the present proceedings is emphasized by the fact that Judge Fitzpatrick heard 57 matters on February 26, 1945 and that the estate of Edward Cebrian was the 49th matter heard by him on that day (Plaintiff's exhibit 21A).

This Court, in *Hewitt v. Hewitt* (C.C.A. 9, 1927), 17 F.2d 716, said, p. 718:

> "* * * there has been no adversary trial or decision of any issue as between the parties to the present suit."

And in *Dunlap v. Steere* (1891), 92 Cal. 344, the Court said, quoting from other authority:

> "* * * In a case * * * where the proceeding is *in rem,* and the judgment is obtained without the knowledge of the defendant, and the proceedings are all necessarily *ex parte,* it would be hard indeed if this court could not interpose to protect a party against the fraud of the plaintiff. The propriety of this court's interferring in such cases is too obvious to require its vindication." (p. 348)

Later in *Kasparian v. Kasparian* (1933), 132 Cal. App. 773, the Court held, page 781:

> "* * * We think that under this definition the fraud here disclosed must be held to be extrinsic. It did not occur in the course of an adversary proceeding at which the plaintiff was either present or represented."

Accord:

> *Bacon v. Bacon* (1907), 150 Cal. 477, 492, and
> *Curtis v. Schell* (1900), 129 Cal. 208, 215.

Los Angeles Public Records Are an Extrinsic Factor

If we are to assume that a constructive trust requires "extrinsic factors", whether those factors be actual or con-

structive fraud, we find them present in the case at bar.

One factor is that the circumstances which a creditor would most logically follow gave clear record evidence that Edward's estate should have been probated in Los Angeles County, if it were probated at all.

First, Edward Cebrian had lived in Los Angeles continuously from 1938 to 1944 and had with him in Los Angeles his prized personal belongings (this brief, pages 23, 25 and 26).

Second, Edward made it a matter of public record in his voting registration affidavit that his residence was in Los Angeles (this brief, page 25).

Third, Edward's registration affidavit made it a matter of public record that he voted in two general elections in Los Angeles County.

Fourth, Edward's death certificate made it a matter of public record that his usual residence was in Los Angeles.

Fifth, defendant made it a matter of public record *under oath* in her petition in probate filed in Los Angeles County that Edward was a resident of Los Angeles County at the date of his death.

Sixth, there was no publication of notice to creditors in Los Angeles County advising them of the San Francisco proceedings.

Seventh, although the Los Angeles probate proceeding went "off calendar", there was nothing in the proceeding to indicate that probate was being conducted in San Francisco.

Eighth, in view of Edward's manifest poverty, a creditor would naturally believe that the petition had gone off calendar because of no assets rather than because of a co-pending probate proceeding in another county.

The foregoing are all matters of public record and since they occurred in a logical county, they are matters of which a creditor should have had constructive notice. It should not need citation of authority to support the logical conclusion that these matters of public record did not give any creditor either actual or constructive notice of anything which might occur in San Francisco, but that on the contrary, they gave effective notice that there could be no probate proceedings in any county other than Los Angeles County.

These undisputed facts are quite analogous to the situation in *Adams v. Hackensack Trust Co.* (1945), 156 Fla. 20, 22 So. 2d 392. The court had before it a situation in which the apparent residence of the deceased was in New York or in New Jersey and his real residence was in Florida. The estate was properly probated at Florida and proper statutory notice was given. The creditor corresponded with the administrator, and the latter, without mentioning where the estate was being probated, said that he would take care of the creditor's claim. The creditor did not learn of the Florida proceedings until after the time to present claims had expired. Although the specific acts are different than in the case at bar, the reasoning of the court with respect to notice and to the extrinsic factor contrary to a logical deduction is applicable to the instant case. The court said pp. 395-396:

> "* * * The deceased had a home in New York, one in New Jersey and one in Florida. In the mortgage held by the plaintiff the deceased stated his residence to be in the State of New Jersey. One of the executors told the Trust Officer that deceased died in his (deceased) home in the State of New York but withheld any information to the effect that the will was probated in the State of Florida. This was calculated to mislead the claimant and to cause it to reasonably assume that the

administration of the estate would be either in New Jersey, where the mortgage showed his residence to be, or else in the State of New York, where he died."

* * * * * * *

"* * * In withholding information which was contrary a logical deduction to be drawn from the information given, a fraud was committed which was calculated to mislead, and which did result in misleading, the claimant. It was the perpetration of this fraud and misconduct which opened the portals of a court of equity for the granting of the relief sought."

The same legal principal is applied in *Monk v. Morgan* (1920), 49 Cal. App. 154. In that case it had been the decedent's habit to give certain of his heirs who lived outside California a monthly allowance. Upon the death of the decedent, the executrix filed probate proceedings and gave notice according to statutory rules. However, she gave no notice of the decedent's death to the non-resident heirs and continued to give those non-resident heirs the same monthly allowance that decedent had given them. After the estate was closed the heirs learned for the first time that the decedent had died and brought an action to enforce a constructive trust. The Court held that equitable relief was appropriate.

Accordingly plaintiff submits respectfully that defendant's silence as to material facts, either with or without fraudulent intent, warrants equitable relief.

The Caledonia Farms Arrangement Was an Additional Extrinsic Factor.

Another extrinsic factor is found in the fact that defendant did not make of record a substantial asset of decedent until long after the time provided by statute so to do.

In 1918 or 1919 John Cebrian bought Caledonia Farms (R. 73), a large tract of land in Yolo County (R. 59). In 1930, John Cebrian made a present of it to Edward and Ralph Cebrian (R. 73).

On August 21, 1934, when he filed his farmer-debtor proceedings, Edward was still a one-half owner of Caledonia Farms. His petition valued his one-half interest at $55,000 and listed liens against the premises in the total amount of $17,433.41 (Plaintiff's Exhibits 22-F, 22-B and 22-C). This gave Edward a net equity at that time of $37,566.59.

For a while Edward tried to sell his half interest for $50,000 gross (R. 109), but he was unable to negotiate a sale. In the meantime, Ralph "thought we ought to keep it in the family" (R. 59). Ralph and Edward talked it over and decided that if the sisters would take it over and pay the taxes "then we would be glad to deed it over to them" (R. 59).

Edward deeded his half share to defendant on March 21, 1935 (Plaintiff's exhibit 7, R. 39). Defendant had the property in trust for Edward (Defendant's exhibit B, page 20). Defendant could not take care of it and she deeded it to her sister Josephine C. McCormick on October 30, 1935 (Plaintiff's exhibit 8, R. 40).

After Edward had deeded his interest in the property, Hugh J. Welden, the attorney for John S. Barbee, advised the attorneys for Van Meter-Terrell Feed Company, as of November 11, 1935, as follows:

> "* * * I understand all his (Edward's) resources to be involved in this ranch property, this would mean that collection of anything on the note would be extremely problematical." (Plaintiff's exhibit 26).

Then in March or April of 1938 Edward lost his rights in Cuyama Ranch (R. 59, 98). During this period, the attor-

neys for Van Meter-Terrell Feed Company wrote to Mr. Welden and asked him what the situation was as of March 22, 1938, calling his attention to the earlier investigation of 1935 (Plaintiff's exhibit 26).

Mr. Welden responded on March 30, 1938, that:

> "This (that maybe you could find some assets at some later date) is doubtful, and my investigation at the time indicated that Mr. Cebrian had nothing of any importance outside of the ranch." (Plaintiff's exhibit 26).

In the interim, Josephine C. McCormick was holding Caledonia Farms in secret trust for Edward and had intermingled Caledonia Farms with her own personal property in her income tax returns (Defendant's exhibits D-1 to D-4; R. 63). Defendant and Mrs. McCormick both recognized Edward's continuing interest in Caledonia Farms during this period by filing and payment of claims for past taxes covering this period (R. 64).

Then in 1940, after Edward was well settled in Los Angeles, Mrs. McCormick began to file independent returns of income for that property (R. 63), but Edward's interest still was not made a matter of public record.

This condition continued until Edward's death in 1944. In 1944 after Edward died Mrs. McCormick disclosed to her brother Ralph Cebrian and her sister Mrs. Koch that she had set up this trust (R. 62, 63).

At the date of death, this asset had a value of $112,500 (R. 114). But no mention of that fact was made in either the Los Angeles or the San Francisco petition (Plaintiff's Exhibits 13 and 21). And Probate Code Section 440(3) states that a petition "must state" among other things "The character and estimated value of the property of the estate."

The Probate Code provides further, sec. 600, that the administrator "must file with the clerk of the court an inven-

tory and appraisement of the estate of the decedent which has come to his possession or knowledge", and this "within three months after his appointment, or within such further time as the court or judge for reasonable cause may allow."

The three month period expired on May 26, 1945, but defendant waited almost 3 years until April 1, 1948 to file the inventory (R. 114).

Thereafter, on November 12, 1948, Mrs. McCormick transferred record title to Caledonia Farms to the estate and on April 8, 1949 she deeded the property to the heirs of Edward Cebrian (Plaintiff's exhibits 15 and 16, R. 43-44).

Thus, from March, 1935 to November, 1948, the Yolo County records failed to disclose that Edward in fact had any estate in Caledonia Farms; the San Francisco records failed to disclose it until long after the time to file creditors' claims had expired; and the Los Angeles records never disclosed it.

As a fiduciary, defendant should have made every effort to call this asset to the attention of creditors rather than to maintain silence until it was too late to file claims and rather than to make this asset a matter of public record in a county in which Edward had not resided for at least 8 years. And this is true regardless of fraudulent intent.

Plaintiff Did Not Have Constructive Notice of the San Francisco Proceedings.

Because defendant published notice of hearing her petition and notice to creditors in the San Francisco paper, the District Court concluded that plaintiff and her predecessors in interest had constructive notice of the San Francisco proceedings (Finding 12, R. 25; Conclusion II, R. 29). Specifications 5 and 6 assert error in this regard. Plaintiff contends that this was error in three independent respects.

In the *first* place, as a matter of law, constructive notice does not bar an equitable action. This principle is applied in *Bergin v. Haight* (1893), 99 Cal. 52. In that case, an administrator, through a straw man, improperly purchased an asset of an estate and one of the heirs at law brought an action to quiet title as against this asset. Defendant alleged that the proceedings complied with the statutes and the Court agreed, p. 55, that the Probate Court had jurisdiction to order and confirm the sale. After pointing out that the instant action was not a collateral attack but was a direct attack, the Court disposed of the constructive notice question, p. 56, as follows:

> "* * * The plaintiff had only constructive notice of the administration and proceedings to sell."

Dunlap v. Steere (1891), 92 Cal. 344, quoting from authorities of other states with approval, is in accord:

> "* * * the rule of the cases cited cannot be applied in all of its strictness to a case where the defendant has been brought in by newspaper notice only, and had no actual notice of the suit, and, as a consequence, had no real opportunity to defend. The rule must be applied to those cases where the reason upon which it is founded admits of its application." (p. 349).

Therefore, California law requires more than constructive notice as a defense to the instant form of action.

In the *second* place, under the California statutes it would be clear that a creditor would have constructive notice of Los Angeles proceedings because the public records showed that to be his residence. But the statutory language would not appear to give any notice of San Francisco proceedings. Certainly, constructive notice can be no stronger than the actual facts upon which it is based. The logic of this posi-

tion is set forth in *Beckett v. Selover* (1857), 7 Cal. 215, pp. 236-237:

> "* * * it is the object of the law, that administration should never be granted until the death of the person, and then only one administration within the State. The law is compelled to adopt some rule for determining where this grant shall be made; and as the deceased could not have been a resident of two or more counties at the same time, the law makes his residence, at the time of his death, the test by which to determine the place where the grant should be made. * * * The heirs and creditors are bound to know *when* and *where* the deceased died; and they are presumed in law to know this, as they are the parties interested in the estate. When, therefore, the death has occurred, and the Probate Court of the proper county gives proper notice, the heirs and creditors are bound to know the proceedings. But parties interested are not bound to know anything of the proceedings of a Court that has no jurisdiction, because the facts giving jurisdiction do not exist. The persons interested cannot be required to watch the proceedings of all the Probate Courts of the State, at all times."

Indeed, in the *Beckett* case the court went so far as to hold that absence of jurisdictional facts voided the judgment on collateral attack. Although the *Beckett* decision was later overruled on this specific collateral attack point in *Irwin v. Scriber* (1861), 18 Cal. 499 at page 504, the *Beckett* case continues to be considered the law in constructive trust cases as illustrated by *Wingerter v. Wingerter* (1886), 71 Cal. 105, at pp. 110-111.

And in the *third* place, there was no constructive notice of the San Francisco proceedings, irrespective of the other foregoing elements, because the creditor was not in California at the time the notices were published.

Baylor Van Meter was the sole owner of the Van Meter-Terrell Feed Company, a Kentucky corporation, and he died at Lexington, Kentucky on June 6, 1945 (Finding 7, R. 24). But the notice to creditors had been published between February 27, 1945 and March 28, 1945 (Defendant's exhibit C). There is no evidence that Baylor Van Meter was in California while the notices were under publication. "That which does not appear to exist is to be regarded as if it did not exist." Civil Code, sec. 3530.

The rule negating constructive notice under the foregoing circumstances is stated in *Sterling v. Title Ins. & Trust Co.* (1942), 53 C.A. 2d 736 at page 749, as follows:

> "* * * A nonresident creditor who learns of the death within this state of his debtor may stand upon his right to present his claim at any time before distribution, unless he has actual notice of the fact of which creditors in the state have constructive notice by the publication and is not obliged to inquire whether notice to creditors has been given nor as to a limitation of time prescribed thereby, and if he is under no duty to make such inquiry the law charges him with no notice of facts which would have come to him through an inquiry."

Plaintiff therefore submits that the court was in error in concluding that there was constructive notice of the San Francisco proceedings.

The District Court Erred in Deciding Causal Relation.

Plaintiff introduced no evidence establishing that a claim would in fact have been filed if the defendant had pursued a proper course. As a consequence, the District Court concluded that "no acts of defendant have deprived plaintiff, or her predecessors, of their right to file claims" (Finding 16, R. 27-28). Specification 9 urges error in this regard.

By way of review, the indisputable evidence discloses that defendant was a fiduciary; that probate was had in San Francisco solely by virtue of the testimony of defendant; that defendant and her brother and sister were creditors of the estate; that defendant and her brother and sister were heirs of the decedent and that they obtained the property of the decedent free from any claim of any outsider.

The record is equally clear that no outside creditor of the decedent filed any claim against the estate and that the debt due to plaintiff's predecessors has been unpaid.

We cannot predict what Baylor Van Meter would have done if proper notice had been given because he died shortly after the time when such notice would have been published.

We submit that there is a causal relationship between defendant's benefit and plaintiff's injury as a matter of law. The legislature wisely determined that the estate of a decedent "must be" probated in the county of his residence and that notice to creditors "must be" published for four consecutive weeks in "the county" (Probate Code, sections 301(1), 700 and 701).

And when "the Probate Court of the proper county gives proper notice the heirs and creditors are bound to know the proceedings." *Beckett v. Selover* (1857), 7 Cal. 215, 237.

The law presumes that "a person takes ordinary care of his own concerns" (Code of Civil Procedure, sec. 1963, para. 4). Since there is no evidence that creditors would not have complied with the requirements of Probate Code, section 707 if proper notice had been given, the statutory presumption establishes the causal relationship between defendant's acts and the results in this case.

But beyond that, we submit that the beneficiary of a fiduciary relationship is not required to prove a causal relation-

ship between the benefit to the fiduciary and the injury to the cestui.

Olivera v. Grace (1942), 19 C.2d 570, 578 states:

> "Finally, it is suggested by the defendant that the complaint fails to state a cause of action because it does not allege that a different result would have been reached if the interests of the incompetent had been properly protected. It is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case. (3 Freeman, supra, p. 2465, et seq.; 5 Pomeroy, supra, p. 4701; 15 Cal. Jur. 29.) The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. (Cf. McArdle Real Estate Co. v. McGowan, 109 N.J. L. 595 (163 Atl. 24).) It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding."

In *United States v. Carter* (1910), 217 U.S. 286, the Court discussed a secret profit which a fiduciary had realized on a contract involving his principal. During its opinion, the Court laid down this rule, p. 305:

> "* * * It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, 'You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct.' Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency."

In *Hewitt v. Hewitt* (C.C.A. 9, 1927), 17 F.2d 716, 717, it is said:

> "* * * Nor will we speculate as to what might have happened, had she pursued the proper course."

Plaintiff submits, therefore, that the District Court erred in concluding that the acts of defendant did not deprive plaintiff and her predecessors of their rights to file a claim against the estate.

The Action Is Not Barred for Failure to File a Claim in the Probate Proceedings.

The District Court found that "no claim was ever filed or presented by plaintiff or anyone else upon the promissory note of Edward Cebrian * * * as required by the Probate Code of California" (Finding 17, R. 28) and concluded that any "suit or action to recover upon the promissory note * * * is forever barred" (Conclusion of Law I, R. 29). Specification 12 urges error in this conclusion.

It has been shown that the publication of notice to creditors in San Francisco, rather than in Los Angeles where it should have been published, was brought about through defendant's conduct. No reason in law or in logic requires that conduct in this respect be treated any differently than other conduct resulting in the loss of a litigant's rights.

That there is no distinction in logic appears from *Adams v. Hackensack Trust Co.* (1945), 156 Fla. 20, 22 So. 2d 392. That case, discussed above in this brief pp. 44-45, involved a situation in which the fiduciary withheld information where the estate was being probated. In that case, as in this case, the creditor did not learn where the estate was being probated and no claim was filed within the statutory period of time. The court decreed a constructive trust. True in that

case, a claim was filed after the statutory period of time but, since tardy filing could have no legal effect, that difference is not believed to create a distinction between the cases.

The same result should obtain in this state. For example, in *Stanley et al v. Westover* (1928), 93 Cal. App. 97 the court, in an action not even involving constructive fraud, directed the entry of judgment in equity in favor of a creditor as against the heirs of an estate and ordered the debt to be a lien on certain property involved in the controversy. At page 110, the court said:

> "The failure of Westover to present his claim against the estate of Fanny L. Stanley did not operate as an extinguishment of the debt."

Further, it has also been shown that at the time that the notice to creditors was published in February and March of 1945 the creditor was a resident of the state of Kentucky and that he died shortly after the completion of publication and within the six months period to file claims.

In *Sterling v. Title Ins. & Trust Co.* (1942), 53 Cal. App. 2d 736 the court said, p. 749:

> "* * * A nonresident creditor who learns of the death within this state of his debtor may stand upon his right to present his claim at any time before distribution, unless he has actual notice" of the proceedings.

We therefore urge error in the determination of the trial court that the instant action is barred by failure to file a creditor's claim.

The Cebrian Note Did Not Provide Simple Interest

The Court found that the note in question provided for simple interest (Finding 10, R. 25). Plaintiff submits that this is in error (Question 5, Specification 18).

The note provides in part as follows:

> "Six Months After Date, * * * I promise to pay * * * the sum of $10,276.92 with interest at the rate of six per cent per annum from date until paid, without defalcation, interest payable at maturity and thereafter semi-annually until paid in full * * *." (Finding 5, R. 23)

This language specifically provides that principal with interest are due at maturity and that interest is payable thereafter semi-annually *until paid in full.* Arithmetically, if one computes the interest in accordance with this language, making the semi-annual rests as recited in the agreement, one cannot fail to compute compound interest.

The specific language of the note in suit has not been specifically construed in any reported California decision which the plaintiff has been able to find. But general language in 33 CJ 207, Interest, Section 66, note 84, recites:

> "But where there is an agreement for the payment of interest periodically after the maturity of the principal debt as well as before, interest will be allowed on installments of interest falling due after maturity of the principal and unpaid."

The foregoing language is brought down to date in 47 CJS 26, Interest, Section 15, Note 16. The note cites *Ashford v. Traylor* (1931), 43 Ga. App. 507, 159 S.E. 777. There the court said that where a note "* * * contained a stipulation that it should continue to bear interest from date, payable semi-annually, at the rate of 8 per cent. per annum, until paid, there is manifested an expressed intent to vary the general rule that accrued interest should not bear interest subsequent to the maturity of the principal obligation."

Plaintiff therefore concludes respectfully that the District Court erred in determining that the language provided

simple interest. It is submitted that interest should be compounded in accordance with the expressed intent of the note.

The Disputed Findings Do Not Support the Judgment.

Prior sections of this brief urge that the specific findings do not support the judgment because the absence of intent to defraud and the absence of proof of causation are not essential elements to an equitable action of this type. This section urges that even if they be deemed essential elements, the findings of fact are clearly erroneous on the issues presented for review.

Finding 13 determines that defendant's "only reason" for filing a Los Angeles petition was "to avoid delay" and that defendant could and would have proceeded with the Los Angeles proceedings "solely" to meet the contingency that the San Francisco Superior Court might decide that Edward was a resident of Los Angeles. Findings 14 and 15 determine that defendant's acts were not fraudulent (R. 27). Finding 15 states that the allegations of the San Francisco petition "were true and correct according to the best information and belief of defendant" (R. 27). Finding 20 finds an absence of fraudulent intent (R. 28). Specifications 2, 3, 4, 8, and 10 are directed to these findings.

Since all the foregoing findings are interrelated and since the same evidence pertains to each of them, we discuss them as a group. The only evidence in the entire record bearing upon defendant's intent are her deeds and her oral testimony taken on deposition (defendant's exhibit B). There is no question of credibility of witnesses because defendant did not testify in open court.

In the first place, the cold facts negate finding 13. Edward Cebrian died on June 6, 1944 (Finding 9, R. 25); the San Francisco proceedings were filed on February 10, 1945

(Finding 12, R. 25), 8 months and 4 days later; the Los Angeles proceedings were filed on February 20, 1945 (Finding 13, R. 26), 10 days after the San Francisco proceedings were filed; and a decision was reached in the San Francisco proceedings on February 26, 1945 (Finding 13, R. 27), only 6 days after the Los Angeles proceedings were filed. As a consequence if the San Francisco decision had gone against the petitioner, there could have been a delay of only 6 days in filing the Los Angeles proceedings. Certainly when the institution of any probate proceedings was delayed a period of 8 months and 4 days, the prevention of a possible delay of 6 days in filing proper proceedings could not have been a motivated factor for the dual procedure.

Furthermore, this explanation is not supported by any oral testimony whatsoever. We have examined the deposition of defendant from cover to cover (defendant's exhibit B) and find no evidence that the question of delay was the sole purpose for the two proceedings.

Defendant's only stated reason for the two petitions is as follows, defendant's exhibit B, page 15:

> "* * * I filed the two petitions, because I did not know what the law would claim would be his residence."

This reason would not justify either of her petitions because each one of her petitions without qualification states of her own knowledge that Edward Cebrian's residence was in a different place.

Indeed defendant gave no explanation whatsoever justifying two completely opposite oaths on the same matter and on the same day. The two jurisdictional statements set out in full at page 7 of this brief can not be reconciled. One or the other of these two oaths had to be false. This, because "there can only be one residence." Government Code, Section 244 (b).

Defendant made no effort to justify the San Francisco oath other than the following, defendant's exhibit B, page 16:

> "Q. (By Mr. Sooy) Mrs. Koch, was there an allegation or statement in the petition for letters of administration that you filed in San Francisco that was false or untrue?
>
> A. No, I should say not."

Defendant justified her Los Angeles oath as follows, defendant's exhibit B, page 23:

> "Well, he was living there. Doesn't that mean he was a resident? That's the way I took it, that he was living there."

We believe that her Los Angeles oath was the correct one. It is patent that her explanation of the Los Angeles oath would not justify her conflicting San Francisco oath.

Furthermore, defendant was the informant on Edward Cebrian's death certificate and this certificate stated that "the usual residence" of Edward Cebrian was in Los Angeles (plaintiff's exhibit 12). The Health and Safety Code, section 10,375, requires that the certificate of death must contain the "usual residence" of the decedent and the "informant." A death certificate is *prima facie* proof of its contents. *Estate of Lenci* (1930), 106 Cal. App. 171, 175.

It is a misdemeanor to furnish false information affecting any certificate or record. Health and Safety Code, Section 10675. And any facts not correctly stated could have been changed by affidavit. Health and Safety Code, Section 10,575.

If we test the allegations of the petition, the state of her knowledge at the time the allegations were made, and her testimony, we find that the San Francisco allegations were

false as a matter of law. The Penal Code, section 125 states "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." The foregoing language applies to pleadings. *People v. Agnew* (1947), 77 Cal. App. 2d 748, 753. The scope of perjury statutes extends to petitions for letters of administration. *Cowan v. State* (1916), 15 Ala. App. 87, 72 So. 578, 579.

Since defendant's acts were unlawful, the law presumes that "an unlawful act was done with an unlawful intent." Code of Civil Procedure, Section 1963, Para. 2.

Finally, specifications 17 and 18 allege error with respect to findings 18 and 19 (R. 28). These findings recite as follows:

> "18. That all of the facts alleged in plaintiff's Complaint inconsistent with the foregoing findings are untrue;"
>
> "19. That all the facts alleged in defendant's Answer not inconsistent with the foregoing findings are true;"

We submit that these findings do not comply with Rule 52 of the Federal Rules of Civil Procedure and that they should be stricken. Rule 52 (a) says:

> "* * * the court shall find the facts specially * * *"

We have found no authority either approving or disapproving such generalized findings but we submit respectfully that such broad language does not come within the language of Rule 52.

We submit, in summary, that the findings bearing on the elements of motive and intent are clearly erroneous, even if it were deemed that such elements were material to plaintiff's case.

The District Court on Remand Should Determine Laches and Limitations

The District Court did not pass upon the applicability of the statute of limitations or the defense of laches (R. 21, Conclusion VI, R. 30-31) because of its specific finding on the issue of fraud (R. 21). It would appear to be proper, therefore, for the District Court on remand to consider these defenses and any other special defense based upon laches and various statutes of limitations (Conclusion VI, R. 30-31).

CONCLUSION

In conclusion we submit that the District Court erred in concluding that plaintiff is not entitled by law or under the evidence adduced under the trial of this case to a judgment that defendant is a constructive trustee for plaintiff; that it erred in concluding that defendant is entitled to a judgment that plaintiff take nothing by her complaint; and that it erred in failing to enter judgment for plaintiff in accordance with the prayer for relief and in failing to enter findings and conclusions of law consistent with said prayer for relief (specifications 13, 14, and 15).

We submit most respectfully that a creditor is entitled to a judgment declaring an administratrix to be a constructive trustee where the record, as here, shows the following:

1) that the administratrix has sufficient assets on hand to pay the claim;

2) that the administratrix has no defense to the merits of the claim;

3) that the administratrix procured probate of the estate of the decedent and published notices to creditors of the decedent in a county where the Superior Court in fact had no real or apparent jurisdiction;

4) that the administratrix procured such administration by her own testimony and her own verified petition;

5) that the testimony of the administratrix was incomplete in speaking of the jurisdictional facts from which residence is determinable;

6) that the administratrix had a conflicting self interest as a creditor and heir of the decedent;

7) that the administratrix made it a matter of public record by death certificate and by another verified petition that the decedent was a resident of a county other than the one in which actual probate was lodged;

8) that the decedent himself made it a matter of public record by his sworn affidavits for voting registration that he was a resident of a county other than the one in which actual probate was lodged;

9) that the creditor was a nonresident of the state of California at the time the notice to creditors was published;

10) that the administratrix did not make the existence of the assets of the decedent a matter of public record for a period of almost 3 years after she was required by law to file her inventory and appraisement; and

11) that the administratrix and her brother and sister were the only persons to share in the decedent's estate, either as heirs or creditors.

Plaintiff submits that the foregoing facts appear without controversy in this record and that the California authorities and analogous authorities from other states warrant the relief sought. Even if there were no actual intent to defraud any creditor, we submit that the evidence establishes constructive fraud sufficient to require restitution.

Respectfully submitted,

Carl Hoppe
Attorney for Plaintiff

(Appendix Follows)

APPENDIX

Excerpts from Statutes and Rules in Argument.

United States Code, Title 28, Section 1291:

"Final decisions of district courts. The courts of appeals shall have jurisdiction of appeals from final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

United States Code, Title 28, Section 1332:

"Diversity of citizenship; amount in controversy (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: * * * (2) Citizens of a State, and foreign states or citizens or subjects thereof; * * *

Federal Rules of Civil Procedure, Rule 52(a):

"Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Civil Code, Section 2224:

"[Involuntary trust resulting from fraud, mistake, etc.] One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Civil Code, Section 2228:

"Trustee's obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

Civil Code, Section 2234:

"Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

Civil Code, Section 3530:

"That which does not appear to exist is to be regarded as if it did not exist."

Code of Civil Procedure, Section 1963:

"(Disputable presumptions.) All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 2. That an unlawful act was done with an unlawful intent; * * * 4. That a person takes ordinary care of his own concerns;"

Government Code, Section 244:

"Same: Determination of place. In determining the place of residence the following rules are to be observed: (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (b) There can only be one residence. (c) A residence can not be lost until another is gained. * * * (g) The residence can be changed only by the union of act and intent."

Health and Safety Code, Section 10,375:

"Form and contents. The certificate of death shall be divided into two sections, the first section shall contain those items necessary to establish the fact of death and the second section shall contain those items relating to medical and health data; the first section shall contain the following items and such other items as the state department may designate: (1) Personal data concerning decedent: (a) Full name. (f) Date of birth and age at death. (g) Birthplace. (h) Usual residence. (i) Occupation and industry or business. (2) Date of death, including month, day and year. (3) Place or occurrence of death. * * * (5) Informant."

Health and Safety Code, Section 10,575:

"Affidavit of existence of error: Supporting affidavit. Whenever the facts are not correctly stated in any certificate of birth, death, or marriage, already registered, the local registrar shall require an affidavit under oath to be made by the person asserting that the error exists, stating the changes necessary to make the record correct, and supported by the affidavit of one other credible person having knowledge of the facts."

Health and Safety Code, Section 10,675:

"Failure or refusal to furnish correct information: False information. Every person who * * * furnishes false information affecting any certificate or record, required by this division is guilty of a misdemeanor."

Penal Code, Section 125:

"Statement of that which one does not know to be true. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false."

Probate Code, Section 301:

"Jurisdiction of proceedings: (Court: County: Nonresident decedents). Wills must be proved, and letters testamentary or of administration granted and administration of estates of decedents had, in the superior court: (1) Of the county of which the decedent was a resident at the time of his death, wherever he may have died; (2) Of the county in which the decedent died, leaving estate therein, he not being a resident of the state; (3) Of any county in which he leaves estate, the decedent not being a resident of the state at the time of his death, and having died out of the state or without leaving estate in the county in which he died; in either of which cases, when the estate is in more than one county, the superior court of the county in which a petition for letters testamentary or of administration is first filed has exclusive jurisdiction of the administration of the estate."

Probate Code, Section 302:

"Conclusiveness of order granting letters: Exception: [Collateral attack]. In the absense of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

Probate Code, Section 440:

"Contents of petition: [Formal requisites: Filing: Defects as affecting order or preceedings]. A petition for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, and must state:

(1) The jurisdictional facts;

(2) The names, ages and post-office addresses of the heirs of the decedent, so far as known to the applicant;

(3) The character and estimated value of the property of the estate.

No defect of form or in the statement of jurisdictional facts actually existing shall make void an order appointing an administrator or any of the subsequent proceedings."

Probate Code, Section 441:

"Procedure before hearing: [Notice: Posting: Contents: Mailing to heirs]. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause similar notice to be mailed, postage prepaid, to the heirs of the decedent named in the petition, at least ten days before the hearing, addressed to them at their respective post-office addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending."

Probate Code, Section 600:

"[Filing inventory and appraisement: Time: Transmittal of copy to assessor: Form and contents:] When appraisement unnecessary. Within three months after his appointment or within such further time as the court or judge for reasonable cause may allow, the executor or administrator must file with the clerk of the court an inventory and appraisement of the estate of the decedent which has come to his possession or knowledge together with a copy of the same which copy shall be transmitted by said clerk to the county assessor. The inventory must include the homestead, if any, and all the estate of the decedent, real and personal, particularly specifying all debts, bonds, mortgages, deeds of trust, notes and other securities for the pay-

ment of money belonging to the decedent, with the name of each debtor, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and a statement of the interest of the decedent in any partnership of which he was a member, to be appraised as a single item. It must include an account of all moneys belonging to the decedent. If the whole estate consists of money in the hands of the executor or administrator, there need not be an appraisement, but an inventory must be made and returned as in other cases."

Probate Code, Section 700:

"Publication of notice to creditors [to file or present claims: Duty of representative]. The executor or administrator, promptly after letters are issued, must cause to be published in some newspaper published in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against the decedent to file them, with the necessary vouchers, in the office of the clerk of the court from which letters issued, or to present them, with the necessary vouchers, to the executor or administrator, at his residence or place of business, to be specified in the notice, within six months after the first publication of the notice."

Probate Code, Section 701:

"Time of publication: [Neglect of representative to give notice: Death, etc., of representative as affecting time for filing claims]. Such notice must be published not less than once a week for four weeks."

Probate Code, Section 707:

"Claims on contract [and for] funeral expenses: [Necessity for filing or presentation: Time: Failure to

file as bar: Absence from state: Entry by clerk.] All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses, must be filed or presented within the time limited in the notice or as extended by the provisions of section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the state, in which event it may be filed or presented at any time before a decree of distribution is rendered. The clerk must enter in the register every claim filed giving the name of the claimant, the amount and character of the claim, the rate of interest, if any, and the date of filing."

Probate Code, Section 1233:

"Part II of C.C.P. applicable: [Affidavit or verified petition as evidence]. Except as otherwise provided by this code, the provisions of Part 2 of the Code of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to trials, new trials, appeals, records on appeal, and all other matters of procedure.

An affidavit or verified petition must be received as evidence when offered in any uncontested probate proceedings, including proceedings relating to the administration of estates of decedents and proceedings relating to the administration of estates of minors or incompetent persons after a guardian has been appointed therein and in uncontested proceedings to establish a record of birth."

No. 14,741

IN THE

United States Court of Appeals

For the Ninth Circuit

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Plaintiff-Appellant,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Defendant-Appellee.

APPELLEE'S REPLY BRIEF.

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Subject Index

	Page
Statement of the case	1
Special defenses	2
Argument	3
The facts	7
Testimony of Ralph Cebrian	7
Testimony of Isabelle C. Koch	12
Testimony of Edwin C. Koch	25
A final judgment finding that Edward Cebrian died a resident of San Francisco was made in 1945 and is conclusive in this action	30
No causal relation between appellee's acts and appellant's default	32
Order of Probate Court is binding here	35
Filing of second petition for letters of administration in Los Angeles was neither intended, nor did it in fact constitute a fraud on appellant or her predecessors	43
Was alleged fraud intrinsic or extrinsic?	45
Extrinsic fraud	48
Analysis of appellant's argument re: fraud	56
Caledonia Farms—Yolo County	67
Appellant and her predecessors had constructive notice of San Francisco probate proceedings	69

Table of Authorities Cited

Cases	Pages
Abels v. Frey, 126 Cal. App. 48, 14 P. 2d 594	69
Alden v. Superior Court, 186 Cal. 309, 199 Pac. 29	36
Bacon v. Bacon (1907), 150 Cal. 477, 89 Pac. 317	64, 65
Baker v. O'Riordon, 65 Cal. 368, 4 Pac. 232	48
Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 Pac. 2d 1019	49, 50
Beckett v. Selover (1857), 7 Cal. 215	56, 57
Caldwell v. Taylor (1933), 218 Cal. 471, 23 Pac. 758, 88 A.L.R. 1194	49, 50, 64
Campbell v. Campbell (1907), 152 Cal. 201, 92 Pac. 184	50, 64, 66
Diamond v. Connolly, 251 Fed. 234	63
Estate of Crisler, 83 Cal. App. 2d 431, 188 Pac. 2d 772	31, 41, 46, 54
Estate of Davis (1902), 136 Cal. 590, 69 Pac. 412	70, 71
Estate of Davis (1907), 151 Cal. 318, 90 Pac. 711	71
Estate of Estrem (1940), 16 Cal. 2d 563, 107 Pac. 2d 36	40, 41
Estate of Robinson, 19 Cal. 2d 534, 121 Pac. 2d 734	41, 46, 54
Flood v. Templeton, 152 Cal. 148, 92 Pac. 78	50
Gale v. Witt, 31 Cal. 2d 362, 188 Pac. 2d 755	52
Hewitt v. Hewitt, 17 Fed. 2d 716	59, 60, 62, 63, 64
Holabird v. Superior Court, 101 Cal. App. 49, 281 Pac. 108	37, 47
In re Griffith (1890), 84 Cal. 107, 24 Pac. 381	47, 54
Irwin v. Scriber (1861), 18 Cal. 499	56, 57
Latta v. Western Investment Co., 173 Fed. 2d 99	71
Lynch v. Rooney (1896), 112 Cal. 279, 44 Pac. 565	49, 52
Mulcahey v. Dow (1900), 131 Cal. 73, 63 Pac. 158	49, 52
Newman v. Commissioner, 222 Fed. 2d 131	63

Pages

Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007..... 48
Patterson v. Dickinson, 193 Fed. 328..... 63
Pico v. Cohn (1891), 91 Cal. 129, 25 Pac. 970, 27 Pac. 537...48, 49

Sohler v. Sohler (1902), 135 Cal. 323, 67 Pac. 282.....50, 64, 66
Stevenson v. Superior Court (1882), 62 Cal. 60..... 58

United States v. Carter (1910), 217 U.S. 286, 54 L.Ed. 773 59
United States v. Throckmorton, 98 U.S. 61..... 47

Wolfsen v. Smyth, 223 Fed. 2d 111.....62, 63

Zaremba v. Woods (1936), 17 Cal. App. 2d 309, 61 P. 2d 976 49

Statutes

Act of March 27, 1858 (1858 Statutes, 95)..... 56

Code of Civil Procedure of California:
Section 337(1) 2
Section 338(4) 2
Section 361..... 2
Section 473 40

Probate Code of California:
Section 300 60
Section 301 36
Section 302 .....36, 41, 46
Section 326 .....49, 59
Section 328 .....49, 59
Section 440 .....59, 60
Section 441 .....59, 60, 61
Section 700 61
Section 708 63

Miscellaneous

Regulations 105, Section 81.30..... 63

20 Cal. Jur. 2d 76, Section 41..... 69

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Defendant-Appellee.

APPELLEE'S REPLY BRIEF.

This is an action brought on November 6, 1952, by the alleged successors in interest of the original payee of a promissory note made in 1932, to recover from the estate of the deceased maker of said note (R. 7) and from defendant individually.

STATEMENT OF THE CASE.

This action is forever barred due to the failure of any holder of the note in suit to file a creditor's claim

in probate within the six months period provided in the California statute. (R. 29, Conclusion I.)

It is admitted no such claim was ever filed. (R. 28, Finding 17, Appellant's Opening Brief, page 9.)

Appellant seeks to escape this absolute bar by alleging that her predecessors in interest were defrauded by the defendant administratrix and thereby prevented from filing a claim in the Edward Cebrian probate proceeding.

This question of fact has been determined adversely to appellant after three years of litigation replete with motions, countermotions, briefs, trial and argument.

The Findings of Fact and Conclusions of Law on this primary issue of fact: the alleged fraud of defendant-appellee dispose of the entire case and find abundant support in the record.

SPECIAL DEFENSES.

In her answer appellee has properly pleaded and relied on the following special defenses (in addition to the defenses based upon the failure to file a claim in probate and the absence of fraud):

1. That the appellant's claim is barred by the provisions of Sections 337(1), 338(4), and 361 of the California Code of Civil Procedure. (R. 19.)

2. That appellant's claim to equitable relief is barred by aggravated and prejudicial laches. (R. 20.)

3. That the promissory note which was payable in Lexington, Kentucky, must be interpreted according

to the laws of Kentucky and in such case the note does not contain any language which constitutes a waiver of the statute of limitations. (Defendant's Reply Memorandum filed in Trial Court, dated April 20, 1954.)

4. Appellant failed to establish title to the promissory note in suit due to the absence of proof of any transfer from Van Meter Terrell Feed Co., a Kentucky corporation, to any other person in the alleged chain of title.

While it is true these rather complex defenses, which involve interesting and intricate conflicts of law questions, were unnecessary to the decision of this case in view of the findings of fact against appellant's claim of fraud, nevertheless they are matters of law and if this Court were of the view no evidence supported the Trial Court's decision, we submit a decision on these special defenses should be made here, avoiding further delay and expense through remand. Therefore Appellee will present her argument upon such special defenses in an appendix to this brief so that this litigation may be terminated without the necessity of further proceedings in the District Court and later appeal.

ARGUMENT.

Edward Cebrian lived in Los Angeles for several years before he died. It appears from the record he registered to vote there, although it also appears from uncontradicted evidence that appellee had no knowl-

edge of her brother's voting in Los Angeles. (Isabelle C. Koch Deposition, page 10, lines 5 to 16, and page 15, line 15; Defendant's Exhibit "B", R. 51; Typewritten Transcript, page 32.)*

Despite the evidence that San Francisco was Edward Cebrian's lifetime home and that he always eventually returned here after his sojourns in other places, appellant advances the bald premise that the fact of Edward Cebrian's legal residence in Los Angeles is established conclusively by the record, and that no finding of residence in San Francisco can be supported.

It may be doubted if so complex a concept as legal residence or domicile involving as it does a mixture of intent and action on the part of the subject can ever be established to the extent that no other finding can be supported.

Certainly that is not the case with a man such as Edward Cebrian, who lived for long intervals in Florida, Kentucky and abroad in Europe, but always maintained his home in San Francisco. (R. 65; Koch Deposition, pages 4-5.)

Appellant in reaching her conclusion falls into one serious fallacy. She avers that only a "floating intent" to return to San Francisco on the part of Edward Cebrian is shown. That begs the question. It assumes

---

*The word "letters" at page 32, line 7, of the typewritten transcript, Volume 1, refers to the depositions of Hugh Weldon and Isabelle C. Koch and certain letters referred to in the Weldon deposition. Defendant's Exhibits "A" and "B" respectively. See offer into evidence, page 30, line 6, Typewritten Transcript.

Edward Cebrian did at some time in 1938, or thereabouts *acquire* a Los Angeles domicile. That is the very assumption which the record repudiates.

The fact is that he went unwillingly to Los Angeles. He went there because he was destitute and dependent upon financial aid from his sister, the appellee. (Koch Deposition, page 6, line 20 to page 12, line 18.)

Eventually Edward Cebrian obtained a position as a translator in some government office in Los Angeles. (Koch Deposition, page 4, line 20.)

Efforts were made by Mrs. Koch and her husband to find both employment and lodging for Edward Cebrian in San Francisco, as he had earnestly requested them to do, but to no avail. (Koch Deposition, page 12, lines 3-8, R. 106.)

This evidence discloses, not a surrender of his lifetime San Francisco domicile with a "floating intent" to regain it, but rather that Edward Cebrian never for an instant held the requisite intent to give up his San Francisco residence. He never acquired a legal residence in Los Angeles or elsewhere. He maintained rooms in the Cebrian family home in San Francisco and kept therein various of his personal belongings until 1938, some years after his father died in 1935. (R. 53-56.)

Now what is the significance of this question of where Edward Cebrian had his domicile when he died in June, 1944? The simple fact, upon which appellant's entire case depends for support, is the circumstance that in February, 1945 Isabelle C. Koch exe-

cuted two petitions for letters of administration on her brother's estate. First she filed one in San Francisco and gave the notice of the hearing thereof by mailing and posting to the whole world. (Plaintiff's Exhibit No. 21.) After filing the San Francisco petition, and before the date set for the hearing thereof, a petition for letters of administration was filed in Los Angeles. In that proceeding also notice of the hearing was given as required by the Probate Code. (Plaintiff's Exhibit No. 13.)

To this dual filing appellant seeks to attach the stigma of most vile venality. But the evidence is uncontradicted that Mrs. Koch simply realized that the Edward Cebrian estate had to be probated in the county where he had a legal residence at the time of his death. Therefore, while she believed San Francisco to be the proper county, she knew and appreciated the fact that a court might conclude otherwise on the basis of the Los Angeles habitation. Therefore, she filed the two petitions and submitted the question of residence for decision to the Courts. (Koch Deposition, p. 15.)

Accordingly, on February 26, 1945, Judge T. I. Fitzpatrick, Judge of the Superior Court in San Francisco (where the first petition was filed) heard the evidence in open court and decided that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death, and based upon this jurisdictional fact he appointed defendant-appellee the administratrix of the Estate of Edward Cebrian, deceased.

THE FACTS.

We will note first the evidence before the District Court which supports the findings to the effect that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and not a resident of the County of Los Angeles, where he died. (R. 11, par. VIII; R. 13, par. IX Top; R. 27, par. 15; R. 28, par. 19.)

We preface the quotations from the testimony of appellee's witnesses only with the observation that such testimony shows the earnest desire of Edward Cebrian not to leave San Francisco; not to give up his lifetime home and family ties here, and the reasons why, despite such desires and intent freely expressed, he was compelled against his will to leave San Francisco and go to Los Angeles. Such testimony we submit shows that at no time until death intervened did Edward Cebrian surrender his San Francisco domicile or give up hope of returning to San Francisco.

TESTIMONY OF RALPH CEBRIAN.

"Q. How long have you lived in San Francisco, Mr. Cebrian?

A. Practically all my life.

Q. Are you a brother of Edward Cebrian?

A. Yes, sir.

Q. Where was Edward born?

A. In San Francisco.

Q. Were you also born in San Francisco?

A. Yes, sir, I was."

(R. 52.)

"Q. Is your father deceased?
A. Yes, sir.
Q. When did he pass away?
A. 1935."
(R. 52-53.)

"Q. At the time of his death in 1935, did he own a home in San Francisco?
A. He did.
Q. Where was the home?
A. 1801 Octavia Street.
Q. Were you living in that home at the time of his death?
A. I was.
Q. Did your brother Edward Cebrian maintain an apartment in that home at that time?
A. He did.
Q. Were any of his personal belongings in that home?
A. Yes.
Q. Did they remain there at all times while that home remained in the Cebrian family?
A. Yes, sir.
Q. Will you state to the Court what the extent of his apartment was?
A. He has two rooms, his own rooms on the main floor, and a camera room, we called it. He was very much interested in photography, and a very elaborate camera room with all his lenses, cameras, and so forth—three rooms which were exclusively his.
Q. What happened to the home after your father passed away?
A. He bequeathed the home to me, and I was forced to sell it to satisfy an obligation.

Q. When did you move out of the home?
A. In 1938, March 19th, 1938."
(R. 53-54.)

"Q. Who was actually living in the home at the time your father passed away?
A. Myself, my brother; the two of us.
Q. Which brother are you referring to?
A. My brother Edward.
Q. How long did your brother Edward continue to live in the family home with you?
A. Well, right practically until—in fact, until the day I moved out. He moved out a few days later.
Q. Did he spend some time at the Cuyana Rancho in Santa Barbara County?
A. Yes, sir."
(R. 54.)

"Q. When did you and your brother Edward last meet, Mr. Cebrian?
A. In the fall of 1938.
Q. Where was he staying at that time, or living?
A. At the Palace Hotel.
Q. In San Francisco?
A. San Francisco.
Q. Where did you meet?
A. On First (Bush) Street.
Q. Who was present?
A. Opposite my home, then. I had moved from the residence to a small apartment on Bush Street and he was coming to visit me, and I was just coming home and we talked on the sidewalk.
Q. Who else was present then?
A. Just the two of us.

Q. Will you please tell the Court the conversation you had with your brother Edward at that time?

A. Yes. My brother Edward had come to see me and told me that our sister Isabelle wanted him to move down to Los Angeles.

The Court. His sister Isabelle?

A. Isabelle Koch, and she told him if he moved down there she would do the best to help him live, and so forth, and he came to me to ask me to intercede with my sister and ask her because he wanted to remain in San Francisco. I advised him that I thought the best thing for him to do was to accede to her request and perhaps the family could work it out so he could return to San Francisco.

Q. Did he tell you he wished to remain in San Francisco?

A. Yes, indeed."

(R. 55-56.)

"Q. Where was your brother living at the time you had the conversation with him on Bush Street in 1938?

A. At the Palace Hotel in San Francisco.

Q. Do you recall receiving a communication at your brother's office from your brother Edward Cebrian in Kentucky regarding his registration for the census.

A. Yes, I recall that very plainly. In 1930 he was in Kentucky, and he couldn't be here when the census was being taken, and he wrote a letter to the office asking—saying he would not register in Kentucky but he wanted us to register him in San Francisco.

Q. That was for the census?
A. The census."
(R. 65.)

"A. * * * While he was at the Palace Hotel in San Francisco and was at the home, before I left it—it was an old home, a twenty-room home that had a laundry—he would bring his laundry from the Palace Hotel, his socks, underwear, handkerchiefs, and they were washed on Octavia Street. The Palace Hotel was a dormitory."
(R. 81-82.)

"The Court. Up to and including the sale of the old family home which you maintained, did you keep and maintain the several rooms and photography gallery your brother had maintained prior to his departure?
A. No, those rooms were his, and he had the key to those rooms, and I never interfered with that. When I moved out of the house in March those rooms were locked, and then he came after the rest of the house was vacated and took out his things. I had keys to these rooms, also, and one morning when he was at the Palace Hotel there were some records he wanted in his business and he asked me to bring them up. I opened the door, got the letters he wanted, locked it, and took them back. It was a friendly relation with those rooms, and there was never any discussion with him about those, your Honor."
(R. 85-86.)

TESTIMONY OF ISABELLE C. KOCH.

The reference to the deposition* of Appellee will be referred to as "K.D." followed by the number of the page and the line number.

"Q. Was your brother born in San Francisco, Mrs. Koch?

A. My brother was born in San Francisco."

(K.D. 3, lines 19, 20.)

"Q. Where was the family home, Mrs. Koch?

A. 1801 Octavia Street, San Francisco."

(K.D. 3, line 26 to 4, line 1.)

"Q. Was he employed in Los Angeles prior to his death?

A. Yes, he was.

Q. Do you know by whom?

A. He had a government position as translator.

Q. Where was Edward Cebrian living before he went to Los Angeles?

A. San Francisco.

Q. Did he ever live at the Cuyama Rancho in Santa Barbara County?

A. Oh, yes, he did.

Q. Where did he live before going to the Cuyama Rancho?

A. The Palace Hotel in San Francisco.

Q. And prior to living at the Palace Hotel where did he live?

A. At Octavia Street in the family home.

Q. Did he maintain a room or apartment in the family home on Octavia Street prior to his death?

*This deposition is Defendant's Exhibit "B" but is erroneously referred to as a letter in the typewritten transcript, p. 32.

A. Yes, he did.

Q. That is, as long as it remained in the Cebrian family?

A. That is correct.

Q. Did he keep some of his personal belongings there, his camera equipment and so on?

A. He did. He kept his belongings there, most of them.

Q. Prior to 1935 did your brother make trips outside of California?

A. Yes, he did.

Q. Did he stay in Florida and Kentucky on different occasions?

A. He did.

Q. Did he also go to Europe when he was a boy with his parents?

A. He did. And also while he was living here he went abroad, England, France.

Q. Following these trips to Florida and Kentucky and to Europe did he always return to San Francisco?

A. He did.

Q. And up until he went to live at the Palace Hotel did he always return to the family home at 1801 Octavia?

A. Always."

(K.D. 4, line 18 to 5, line 22.)

"Q. Were you also supporting your brother during and prior to 1938?

A. Yes, I was.

Q. To what extent were you contributing to his support, Mrs. Koch?

A. Well, over $200.00, and then I would send him food and help him with his clothing. That was extra.

Q. Over $200.00 altogether?

A. Per month, at least.

Q. $200.00 per month?

A. Yes.

Q. Did your brother leave the Cuyama Rancho in 1938?

A. Yes, he did.

Q. And where did he go from there, do you know?

A. He came to San Francisco.

Q. Did you ever talk to him as to where he would live, where he would go after he left the Cuyama Rancho?

A. Yes, I did. He wanted to remain here in San Francisco.

Q. When did you talk to him, Mrs. Koch?

A. Well, after leaving the ranch.

Q. In 1938?

A. '38.

Q. And where did you talk to him.

A. At the Fairmont Hotel.

Q. And did you also talk to him on one occasion at the Palace Hotel?

A. Yes, I did.

Q. And both of those occasions—both of those conversations took place in 1938, is that true?

A. That is correct.

Q. Who was present, Mrs. Koch? Was anyone present besides yourself and your brother?

A. No.

Q. What was the discussion you had with your brother in 1938?

A. Well, he wanted to remain here in San Francisco. I could not afford to keep him living the way he had been used to living. All his friends were here. He was greatly entertained and he

would want to entertain to reciprocate, and I just could not afford it.

Q. Did you suggest that he leave San Francisco?

A. I told him, 'Why don't you go down to Los Angeles where you can get to live in a smaller place that won't be so expensive, and try to find a job there?' He couldn't find anything here. So he condescended, much against his will. He did not want to live there.

Q. In that discussion did your brother Edward Cebrian say to you that he had lost the Cuyama Rancho and had lost all hope of ever regaining it?

A. Oh, no. He always had hopes that he would be able to get it back, and I know he had attorneys down south in Los Angeles and in Santa Barbara also trying to get capital to buy it back.

Q. Was this after 1938?

A. Yes.

Q. And did he tell you that he was making these efforts to regain the ranch?

A. Oh, yes. He was very optimistic.

Q. Did he in fact go to Los Angeles following this discussion with you?

A. Yes, he did.

Q. Did you tell him whether or not you would continue to support him if he went to Los Angeles?

A. I told him I would if he would get a reasonable place, that I would do my best to help him as long as I could.

Q. And did you contribute to his support in Los Angeles?

A. I did.

Q. Did he find employment immediately after going down there?

A. No, he did not.

Q. He subsequently acquired the appointment you mentioned of being a translator, is that true?

A. That is correct.

Q. Were there any other brothers or sisters of yourself and your brother in San Francisco in 1938?

A. Yes, my two sisters, my brother Ralph and myself; four of us.

Q. Who were your two sisters?

A. Josephine McCormick and Beatrice de Sanz.

Q. Were they contributing to Edward's support in 1938?

A. No.

Q. Did they contribute to his support at any time after 1938 as long as he lived?

A. No.

Q. Did your brother Edward Cebrian resist the suggestion that he go to Los Angeles?

A. Yes, he did, many times.

Mr. Hoppe. What did he say to you?

Mr. Sooy. Q. What did your brother say to you when you suggested he go to Los Angeles?

A. He did not want to go. He wanted to be around with his family and amongst his friends; he felt he would be lost; he didn't want to go to Los Angeles.

Q. Is that what he said?

A. Time and time again. He would write to me. He would beg me to send him money to come back just for a visit."

(K.D. 6, line 20 to 9, line 22.)

"Q. Did you ever visit him in Los Angeles?

A. Oh, yes, many times. We would go down. My husband and I would go to Los Angeles at least twice a year and we would visit.

Q. During that period between 1938 and 1944, is that correct?

A. Yes.

Q. Where would you visit him, Mrs. Koch?

A. Well, at first he was staying with a friend who had a guest house, and they were all friends, and that amounted to too much money, so I told him to look around for a less expensive place. He was entertained and he had to entertain too, and that was too expensive. So then he found this place—Mrs. Melcher, I think it was, where he died. That was where he was living at the time he died. He died in the hospital, but I mean where he was living at the time of his death, and that was a boarding house and he only had a room with a little kitchenette—very poor quarters and much less expensive.

Q. Did you visit him in both those residences?

A. I did.

Q. Who would be present when you would visit him, Mrs. Koch?

A. My husband.

Q. And your brother and yourself?

A. That's right.

Q. Did you meet Mrs. Melcher?

A. Yes, I did.

Q. Now, were you sending money to Los Angeles during all this period of time?

A. Yes, I was.

Q. Were you paying his rent even during the time that he was employed?

A. Yes, I would send Mrs. Melcher a check.

Q. Did your brother Edward Cebrian ever say anything to you in Los Angeles about where he was living—where he wanted to live?

A. He always—whenever we would see him he would always say, 'Can't you take me back to San Francisco with you?' We always drove and we said no, we couldn't. I just couldn't afford it. But he always wanted to come back, and he wanted to see his brothers and sisters, and he would write to them.

Q. Did he ask you or your husband to find employment for him in San Francisco?

A. Oh, yes, and my husband did try.

Q. Did he ask your husband, Mr. Koch, to find him a place to live?

A. Yes, cheaper lodging, and we did everything we could, but in those days it was very difficult. We couldn't find it.

Q. Did he say whether or not he would be able to live other than at the Palace Hotel?

A. He wouldn't care after being in Los Angeles for a while. He was depressed and didn't like it. He would have lived any place in San Francisco.

Q. Did he ever ask you to send him the fare so that he could return to San Francisco.

A. Yes, he did.

Q. In your discussions with him in Los Angeles, Mrs. Koch, did he speak of San Francisco or Los Angeles as his home?

A. San Francisco always."

(K.D. 10, line 19 to 12, line 18.)

"Q. Did you file a petition for Letters of Administration in connection with your brother Edward's estate, Mrs. Koch?

A. Yes, I did.

Q. Did you file such a petition in San Francisco?

A. Yes, I did.

Q. And did you also file such a petition in Los Angeles?

A. Yes, I did.

Q. Where did you file the first petition? In which county did you file the petition first?

A. In San Francisco.

Q. Do you recall the date that you filed a petition in San Francisco?

A. 1945.

Q. Do you remember the month or the day of the month?

A. February or March—I don't know.

Q. Did you have a hearing on the petition that you filed in San Francisco?

A. Yes, I filed the two petitions, because I did not know what the law would claim would be his residence, and Judge Fitzpatrick said San Francisco because he was born here; he was raised here. He died in Los Angeles, but he was buried in San Francisco. We brought him here. He wanted always to be buried here, and the judge decided; so when that was decided I cancelled the one in Los Angeles.

Q. You have referred to Judge Fitzpatrick. Who is Judge Fitzpatrick?

A. He is a judge in the courts.

Q. Was he the judge before whom your petition was heard?

A. Was heard.

Q. Did you allege in both petitions you filed that your brother died in Los Angeles?

A. Yes.

Q. Did you know at that time whether or not he had voted in Los Angeles?

A. No.

Q. Did you testify before Judge Fitzpatrick whether or not he had voted in Los Angeles?

A. No.

Q. You did testify at the hearing in San Francisco?

A. Yes, I did. My sister was present.

Q. Did you testify that your brother had been staying in Los Angeles prior to his death?

A. Yes.

Q. And that he had died there?

A. That's correct.

Q. Did you also testify that your brother had been born in San Francisco and that San Francisco had always been his home?

A. Yes.

Q. That he had always returned to San Francisco after——

A. Always returned to San Francisco.

Q. Were you appointed in the proceeding in San Francisco before the hearing of your petition in Los Angeles, before the date set for the hearing of your petition in Los Angeles?

A. Yes."

(K.D. 14, line 14 to 16, line 5.)

"Q. Mrs. Koch, was there an allegation or statement in the petition for letters of administration that you filed in San Francisco that was false or untrue?

A. No, I should say not.

Q. Was there any testimony given by you before Judge Fitzpatrick in support of that petition that was false or untrue?

A. No, I should say not.

Q. Did you file either the Los Angeles petition or the San Francisco petition for the purpose of defrauding Edward's creditors?

A. I should say not. We advertised all over, even back east. If there were any creditors they would come direct to me.

Q. Have you ever concealed any of the assets of your brother's estate, Mrs. Koch?

A. No, I have not."

(K.D. 16, lines 12-25.)

"Q. Did you cause a notice to creditors to be published in the San Francisco probate proceeding?

A. I certainly did.

Q. And was that immediately following your appointment in February, 1945?

A. Yes.

Q. Have you administered your brother's estate during all the years since 1945?

A. Yes, I have.

Q. And except for partial distribution that estate is still open, is that correct?

A. That's correct."

(K.D. 17, line 22 to 18, line 4.)

Cross-Examination

"Q. Now, when Edward died down in Los Angeles you of course went down there, did you not?

A. He was ill, and toward the last period he would write to me and say, 'I want you to please have me in San Francisco where my own doctors can see me.'

I didn't realize he was so ill, because if I had I would have had him here and he would have died in San Francisco."

(K.D. 22, lines 6-12.)

"Q. Now, when you went before the Superior Court judge here in San Francisco—what did you say his name was?

A. Judge Fitzpatrick.

Q. Judge Fitzpatrick. What did you tell Judge Fitzpatrick. What did you tell Judge Fitzpatrick about the proceedings you had filed down in Los Angeles?

A. I told him I had filed them in Los Angeles so that the court would decide which was his residence.

Q. Now, what were all of the facts that you told Judge Fitzpatrick to help him reach a decision?

A. That he was born here in San Francisco; he went to school here in San Francisco, and then they went abroad also to school, but his first schooling he started here. When we came back to America he went to Berkeley to the University, and his family home was here; he always wanted to live here; he would take trips as we all did, and he would always come back home, and that this was his home. He was living temporarily in Los Angeles because he was able to find a job in Los Angeles; whereas here he had not been able to find one. So I left it to the court to decide.

Q. And that's the sum and substance of what you told Judge Fitzpatrick?

A. That's about it.

Q. Can you think of anything else that you told him?

A. No at this moment I don't."

(K.D. 24, line 12 to 25, line 8.)

"Q. Why did you not want Edward to have an inexpensive apartment up here such as the one in Los Angeles?

A. There wasn't any available in those days. It was during the war and no apartments were available here such as the one in Los Angeles. We looked around all over.

Q. Were there rooming houses available up here?

A. We couldn't find anything for him, and besides he wanted to live in the same *vein* as he had been living."

(K.D. 28, lines 9-16.)

Redirect Examination

"Mr. Sooy. Q. Mrs. Koch, I show you Defendant's Exhibit 2, purporting to be a photograph of the death certificate of your brother Edward Cebrian, and I ask you whether or not you ever recall seeing the original of that document.

A. I do not.

Q. After your brother passed away and in 1944 did you fill out any blanks giving information as to his death?

A. I don't understand the question.

Q. Did you fill out any blanks for the doctor or the coroner or anyone?

A. No, I did not. My sister attended to everything.

Q. Do you recall talking to the doctor following his death?

A. I never met the doctor.

Q. Do you recall talking to any public official such as the coroner?

A. We ordered the casket, yes, and made the arrangements for his shipping up here.

Q. Did you order the casket from the coroner or the undertaker?

A. Oh, the undertaker—correction.

Q. Do you recall telling anybody in 1944 in Los Angeles that your brother's permanent home was in Los Angeles?

A. Well, I probably told Mrs. Melcher that, since I was shipping him to San Francisco.

Q. I don't think you understood my question. Did you tell anyone that his permanent home was in Los Angeles at the time?

A. No. I thought you meant in San Francisco.

Q. Do you recall giving anyone information to establish the record of his death?

A. No.

Q. After you filed the petition in Los Angeles of probate of your brother's estate, did you cause notices of hearing in that petition to be mailed to his heirs?

A. Yes.

Q. Do you recall yourself receiving a notice from the Superior Court in Los Angeles telling the date of the hearing?

A. Yes, I do.

Q. Do you recall whether the date of that hearing was in March, 1945?

A. I don't recall.

Q. Did you also cause a notice to be posted in Los Angeles County setting forth the date of the hearing of the Los Angeles petition?

A. Yes."

(K.D. 31, line 1 to 32, line 12.)

TESTIMONY OF EDWIN C. KOCH.

"Q. Do you know where Edward Cebrian went when he left the Cuyama Ranch in the spring?

A. He went to Los Angeles. He was interested in saving the ranch. He went down to interest people in buying it. He was in Santa Barbara, he went to San Francisco. He contacted attorneys to see if he could not save the ranch.

Q. Did he tell you he made those trips for those purposes?

A. Yes, he did.

Q. Did he return to San Francisco in 1938 at all?

A. Yes, he was in San Francisco.

Q. Do you know where he stayed here?

A. I believe it was at the Palace Hotel.

Q. Did you come to San Francisco during that part of 1938 after he had left?

A. Yes, I did.

Q. Where did you see him?

A. I saw him at the Palace Hotel."

(R. 98-99.)

"Q. Did you ever visit Edward Cebrian in Los Angeles between 1938 and the date of his death in 1944?

A. Yes.

Q. On how many occasions, Mr. Koch?

A. I would think perhaps twice a year."

(R. 100.)

"Q. Did he ever write to Mrs. Koch from Los Angeles during that six-year period?

A. Yes, he did.

Q. Did you see and read the letters that he wrote?

A. Yes, I did."

(R. 101.)

"Q. In those letters did your brother ever refer to his being in Los Angeles, his living in Los Angeles?

A. He wrote three or four letters that I remember in which he said that he was unhappy in Los Angeles and wanted to return to San Francisco. At the same time he was asking for more money if he could get it. But he also made it very clear that he wanted to return to San Francisco and make his residence here.

Q. Did he say so in his letters?

A. Yes, he did.

Q. For what purpose did he ask that Mrs. Koch send him funds? Did he specify?

A. For his transportation. He wanted to come up on the bus. He would come up any way that he wanted to. He said that he was not interested at that time in returning to his old habitat, the Palace Hotel, that he would be satisfied living any place that she could find him a room.

The Court. What was that again? He was not satisfied?

The Witness. He was not satisfied—at first Edward Cebrian wanted to stay in San Francisco

and live at the Palace Hotel, and Mrs. Koch did not believe that she was justified in paying his bills and keep in the style to which he had been accustomed. That was the reason she advised him to go to Los Angeles and get away from his friends. He was a man who liked to have big parties. He had a lot of friends here. He objected to that at first. He didn't want to go to Los Angeles. But she was the one who was supporting him, paying his rent, spending money, and he finally went down there, but he always, even after that, he always said he would like to come back to San Francisco, even if he could not live in that style.

The Court. Did Mrs. Koch advance him monies necessary for his current expenses?

A. Yes, she did.

Q. He lived in rather circumspective style in Los Angeles, I assume?

A. No, he had a very nominal rent.

Q. Nominal?

A. Yes, yes, and he was working in Los Angeles as a translator. I do not believe he received much of a salary. However, Mrs. Koch had to augment his expenses.

Q. Did he have any means of support other than the advances which were currently made?

A. None whatsoever, sir, except for a while he was employed in Los Angeles.

Q. As a translator?

A. Yes, sir.

Q. How old was this gentleman when he passed away?

Mr. Sooy. Sixty-two, your Honor."

(R. 102-103.)

"Q. Did you and Mrs. Koch ever drive to Los Angeles between 1938 and 1944?

A. Yes, we did.

Q. Did you ever visit with Edward Cebrian in Los Angeles?

A. We always, every time we went to Los Angeles we visited with him.

Q. Did you ever discuss in Los Angeles with Edward Cebrian the question of his living there?

A. He always wanted to come to San Francisco. He always said that he wanted to make San Francisco his home on every occasion that we were down there, and on one particular occasion we had just come from a little trip and our car was full of our suitcases and he wanted to come back that same day with us, and I told him we didn't have room, we didn't have any accommodations in San Francisco for him. So he actually broke down and cried. He had tears.

Q. And can you tell us when that was?

A. I think that was in 1943. I remember that I had been ill and we thought we would take a few days down south and see if it would help recuperation.

Q. I didn't hear you. Who had been ill?

A. I had been ill.

Q. Mr. Koch, did you and Edward Cebrian ever have a discussion about finding him employment in San Francisco?

A. He asked me to find employment for him and I tried. I asked any number of friends of mine and I also tried to find him living quarters. I went to the Elks Club and I went to Herbert's Hotel for men on Powell Street, two or three different places to see if we could get something

reasonable which was close to what he was paying in Los Angeles.

Q. Were you able to find such accommodations?

A. No, I could not at that time.

Q. During what period of time was that, those conversations?

A. That was in 1943 and 1944 that I tried to find the places.

Q. By the way, on this occasion when you passed through Los Angeles on the return from the trip which you said was in 1943, what was the condition of health of Mr. Edward Cebrian?

A. He was not working that day, and I think the man was really sicker than we anticipated. I thought he was a sort of a baby person. I mean everybody felt sorry for Edward Cebrian. But he was really a sick man.

Q. Did you and Mrs. Koch see him in Los Angeles at any time in 1944 before his death?

A. Yes.

Q. Was he working at that time?

A. Well, not the day that we saw him. I don't remember whether it was on a Saturday or not, but I know he was home that day.

Q. You stated that you tried to find him reasonable quarters in San Francisco. Did he ask you to do so?

A. He asked me that, yes, he did.

Q. Did he ever tell you that he had decided to make Los Angeles his home?

A. Never. He told me many times that he was dissatisfied there, that his friends, most of his friends lived in San Francisco and he would like to be here and he would like to be near his family.

Q. Were any of the other members of the Cebrian family living in Los Angeles during that period of time?

A. No, definitely not."

(R. 105 to 107.)

We submit the foregoing evidence amply supports the finding that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and in such case, of course, the probate of his estate here was proper. And if San Francisco was the proper county for the probate of the Edward Cebrian estate, it follows that it was not a fraud on creditors for defendant to seek letters of administration here, nor has she been "intermeddling with his estate or the proper probate thereof".

But there is another complete answer and defense to appellant's cause of action on the basic question of fraud.

A FINAL JUDGMENT FINDING THAT EDWARD CEBRIAN DIED A RESIDENT OF SAN FRANCISCO WAS MADE IN 1945 AND IS CONCLUSIVE IN THIS ACTION.

Appellee gave notice of the hearing of her petition for letters of administration in the matter of the Estate of Edward Cebrian, deceased, which she filed in the San Francisco Superior Court for the time and in the manner required by law. After letters of administration were issued to her she has taken all steps required of her as administratrix, such as publishing notice to creditors and the like. (Defendant's Exhibit "C".)

Even if we were to concede, which we do not, that there was no basis for a finding that the residence of Edward Cebrian was in San Francisco, this would not be extrinsic fraud which would have prevented appellant or her predecessors in interest from appearing before the Probate Court and presenting their views.

Estate of Crisler, 83 Cal. App. (2d) 431 at 434, 188 P. 2d 772.

Let us expose the fallacy which infects the very heart of appellant's case.

Following Edward Cebrian's death it was obvious that he was a resident of either San Francisco or Los Angeles. It was for the Probate Court, not appellee, to determine this issue. Accordingly she prepared and filed her petition for letters of administration and filed it in San Francisco. In it she alleged that Edward Cebrian was a resident of the City and County of San Francisco, State of California, and the Court so found when it appointed her administratrix.

Certainly these actions did not constitute fraud in view of the facts regarding (1) Edward Cebrian's long residence in San Francisco, (2) his absence which resulted from and was made necessary solely by his employment and his financial dependence on appellee, (3) his maintaining many of his personal belongings in the Cebrian family home in San Francisco which their father had devised to his brother Ralph Cebrian, so long as Ralph Cebrian owned the home, (4) his statement to his brothers and sisters

that he did not wish to go to Los Angeles, that San Francisco was his home and that he wished to remain here, (5) his requests for financial aid made to his sister, appellee, so he could return to and live at the Palace Hotel, or some other place in San Francisco, and (6) his resistance to the original suggestion he go to Los Angeles. (Defendant's Exhibit "B", and testimony of Edwin Koch and Ralph Cebrian set out herein.)

Thus it must be concluded for the purpose of this action that no fraud, either extrinsic or intrinsic resulted from instituting the pending probate proceeding in San Francisco.

NO CAUSAL RELATION BETWEEN APPELLEE'S ACTS AND APPELLANT'S DEFAULT.

Now to take a step further, let us determine whether appellee did anything to prevent appellant, or her predecessors, from having their day in Court.

After filing her petition for letters in San Francisco and before any hearing thereon, appellee appreciated the fact that the circumstance that Edward Cebrian had lived for several years and died in Los Angeles might cause the San Francisco Probate Court to find that his legal residence was in Los Angeles, rather than San Francisco. Therefore, in order to be prepared for this eventuality and be able to proceed promptly with the administration of Edward Cebrian's estate in Los Angeles, if the San Francisco Superior Court concluded it had no jurisdiction, she

filed a second petition for letters of administration in Los Angeles.

Her allegation in that Los Angeles petition regarding her brother's residence was made before any Court anywhere had determined the fact of residence *and it was made in the form of a bare conclusion.* This must be compared with her factual presentation of Edward Cebrian's San Francisco residence, which is found in her deposition here and which has the backing of a finding of fact made by T. I. Fitzpatrick, Judge of the San Francisco Superior Court, which order is res adjudicata of the matter, as we will show.

Now let us see whether the filing of the Los Angeles petition for letters under the circumstances outlined herein had any effect on appellant or her predecessors, or constituted a fraud upon the Court or their rights.

(I) First of all, it does not appear that it had any effect whatever upon appellant's rights, because neither she, nor her predecessors had knowledge of these matters until after May 20, 1950. (Complaint, paragraph 13, R. 7.)

(II) Appellant, or her predecessors, had *constructive notice* of the pendency of the San Francisco probate proceeding before *constructive notice* of the Los Angeles petition was gained, because the San Francisco notice provided by the Probate Code was necessarily given first, the petition having been filed in San Francisco eleven (11) days earlier than the one in Los Angeles.

Thus, whether it be actual or constructive notice with which we are concerned, neither appellant, nor her predecessors, could possibly have been misled, defrauded or in any way prejudiced by the actions of appellee.

(III) If it be true, as we contend, that appellant would have no right to any relief if the San Francisco probate petition had been the only one filed, let us examine the question whether the filing of the later Los Angeles petition actually constituted any violation of appellant's rights or fraud upon her.

Actually we submit that the very fact that a petition for probate *was* filed in Los Angeles which emanated from San Francisco and bore the name and address of appellee's present attorney and *the names and addresses of all of the heirs at law* of Edward Cebrian, deceased, showed a diligent attempt to have a valid probate administration, as directly opposed to an attempt to conceal the fact that Edward Cebrian had died and left an estate. Of course the appellee abandoned the Los Angeles proceeding when the San Francisco Court determined that it had jurisdiction by reason of Edward Cebrian's residence in San Francisco. The San Francisco Superior Court had *exclusive* jurisdiction to determine that fact of residence, and having done so, the Los Angeles Superior Court would have been powerless to act.

Let us assume in direct opposition to the admitted facts, that appellant and her predecessors had actual knowledge of the filing of the Los Angeles probate proceeding on the day it was filed but never had any

actual knowledge of the San Francisco probate administration. Can any creditor so negligent as to fail to inquire of the petitioner or her counsel why the petition was not heard and further proceedings taken, be excused after seven years of sleeping on her rights? Can any one argue that such a creditor is not much more fully informed and put on notice as to his rights through *actual* notice of such a petition, than if no such petition had ever been filed?

We respectfully submit that not only is there a complete absence of any showing of fraud on the record before this Court, but that the facts admitted by appellant in the complaint conclusively foreclose a finding of fraud on the part of appellee, or any harm therefrom to appellant.

ORDER OF PROBATE COURT IS BINDING HERE.

The fact that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death is not an issue in this case. The elaborate attempts by appellant to "prove" by testimony and exhibits that he was a resident of the City of Los Angeles are ineffective for any purpose.

The reasons for this basic premise are to be found in the provisions of the Probate Code of California and the cases decided by the Supreme Court of the State of California.

> "*Jurisdiction of Proceedings.* Wills must be proved, and letters testamentary or of admin-

istration granted and administration of estates of decedents had, in the superior court:

"(1) Of the county of which the decedent was a resident at the time of his death, wherever he may have died."

Probate Code of California, Section 301.

Residence is an essential jurisdictional fact upon which the power of the Probate Court to administer an estate depends.

Alden v. Superior Court, 186 Cal. 309 at 312, 199 P. 29.

Section 302 of the Probate Code of California provided as follows:

"In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked."

Thus when Edward Cebrian died on June 6, 1944 and a petition for the probate of his estate and the issuance to Isabelle C. Koch of letters of administration was granted by the Superior Court of the State of California, in and for the City and County of San Francisco, the question of residence was conclusively determined for all time as against the whole world. There was never a direct attack by appeal or motion and the attempt by appellant here to impeach that order and the finding of decedent's residence in San Francisco in a separate action is a collateral attack.

The San Francisco Superior Court was fully advised by verified petition that the decedent had died in Los Angeles and the factual question as to his legal residence was submitted to the Court and decided. Being a mixed question of law and fact involving the intent of the decedent, it is sometimes most difficult to determine. Physical presence and voting are factors only and not conclusive of the matter, as counsel suggests. But regardless of whether a finding that the decedent was a resident of Los Angeles, and that the San Francisco Probate Court could not administer the estate, might have been entered in 1945 and even sustained on a direct attack as having support in the evidence, the contrary finding having been made, that issue has been determined and that determination is binding here.

The cases on this subject are so numerous and clear that we do not presume to labor the point in argument beyond stating the conclusion they support.

In *Holabird v. Superior Court,* 101 Cal. App. 49, 281 P. 108, a factual situation similar to that presented here is found, except that the attack on the finding of the jurisdictional fact of residence was made in the probate proceeding instead of in a separate action in another Court. The facts in the *Holabird* case were these: One Bessie Ball died and Leo Seibert sought and obtained letters testamentary in Fresno County alleging that Bessie was a resident of Fresno County. Notice of the hearing was given as required by law. Later a sister of the deceased filed a notice of motion in the probate proceeding to re-

voke Seibert's letters and dismiss the probate proceeding. Her motion was made on the ground that Bessie was a resident of Los Angeles and that the Fresno Court, therefore, lacked jurisdiction to admit the will to probate. Affidavits were filed by the moving party and counter-affidavits were filed by the executor, who had apparently been accused of testifying falsely.

At the time of hearing, however, the executor contended that the Court had no power, authority or jurisdiction to grant said motion, upon the ground that the order granting letters was conclusive upon all persons as to the matters adjudicated in the order and particularly as to the residence of the deceased. The probate court refused to entertain the motion and the sister sought a writ of mandate to compel the Probate Court to hear the matter. The Court's decision is as follows:

> "It is the settled law of this state that an order granting letters of administration is an adjudication of the fact of residence of the deceased in the county over which the court has jurisdiction, and it is binding upon the whole world, unless vacated or set aside on direct attack, for all the purposes of the administration of the estate of the deceased. (*Estate of Relph,* 185 Cal. 605 (198 Pac. 639); *Estate of Dole,* 147 Cal. 188 (81 Pac. 534); *Estate of Latour,* 140 Cal. 414 (73 Pac. 1070, 74 Pac. 441).) While residence is jurisdictional, it is one of those jurisdictional facts which the court must determine from evidence produced before it and when determined, it cannot be attacked collaterally. (*In re Estate of Griffith,* 84 Cal. 107 (23 Pac. 528, 24 Pac. 381).) The Su-

perior Court of a county in which the petition for letters has first been filed has exclusive jurisdiction to determine the question of residence of the decedent, and the courts of other counties must abide by the determination of that court, which is reviewable only upon appeal. (*Estate of Spencer,* 198 Cal. 329 (245 Pac. 176).) Here the court had jurisdiction to hear the proceeding and weigh the evidence and consider its sufficiency to establish the residence of the deceased, and if it erred in that respect, the proper remedy was by appeal within the time allowed by law. As above stated, no claim is here made that any extrinsic fraud was practiced in the procurement of the order and the petition alleges that proper notice was given to all interested parties of the time and place of the hearing, as required by law.

"Under these circumstances, the petitioner is not entitled to the remedy prayed for. The petition is therefore denied."

(Pages 52-53.)

So here the fact that proof was offered by appellant in support of a contention that the San Francisco Superior Court erroneously determined residence does not confer upon this Court the power or authority to re-adjudicate that issue. It has been conclusively determined and that determination is res adjudicata.

Now since appellant's complete failure to file a claim in the Edward Cebrian estate is based entirely upon the false hue and cry about residence, the whole framework of her case collapses and she stands before

the Court unable to allege or prove the first requirement, to-wit: the presentation of a proper and timely claim in the proceedings for the probate of the Estate of Edward Cebrian, deceased.

In *Estate of Estrem* (1940), 16 Cal. (2d) 563, 107 P. 2d 36, a motion was made under Section 473, Code of Civil Procedure of California, in the probate proceeding to revoke the probate of a will pending in Alameda County and recall the letters testamentary. This motion involved the jurisdictional question whether or not the decedent, who was a non-resident, actually left estate in Alameda County. The issuance of letters, of course, contained the implied finding that she did leave property there. The Court held that that finding was conclusive, saying at page 570:

> "We are of the opinion that section 473 does not permit such an attack upon the original finding of jurisdictional fact by the probate court. The jurisdiction of the court to render a judgment or order often depends upon the preliminary determination of certain jurisdictional facts. When all parties affected are actually or constructively before it with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of such facts by the court may be reviewed only by an appeal or other timely and available direct attack. This finding cannot be attacked in a proceeding under paragraph 4 of section 473 to have the judgment declared void, nor can it be attacked in any collateral proceeding. In such situations the finding is as conclusive as any other finding of fact by the court in the original proceeding."

Estate of Robinson, 19 Cal. (2d) 534, 121 P. 2d 734, involved a situation similar to that in *Estate of Estrem,* 107 P. 2d 36, supra. The Court said:

> "There is no distinction between the Estrem case and the present case which would justify a refusal to follow the well-settled doctrine of conclusiveness of such an order as is here involved."

The Court went on to make it clear that it is only *extrinsic* fraud which will affect the rule that a finding on a jurisdictional fact is conclusive. (See Section 302, Probate Code, supra.)

A recent probate case involving the finding of residence goes much further than the other cases cited and indeed much farther than is necessary to blow away the appellant's "residence" issue. In *Estate of Crisler,* 83 Cal. App. (2d) 431, 188 P. 2d 772, a petition to probate the decedent's will was filed in Sacramento County alleging she died in Oregon but was a Sacramento resident. The petition was granted and letters testamentary issued. Later a beneficiary sought to revoke the probate on the ground that decedent was a resident of Oregon at the time of her death and that "there was fraud" when the executor alleged and testified that she was a resident of Sacramento County. Affidavits were filed by the beneficiary in support of this motion. The conflict between the executor's proof of residence as Sacramento County and that of the beneficiary was quite obviously not a showing of extrinsic fraud. The Court closes with the following statement, at page 434:

"Finally it may be stated that even though it could be said that Rodolph's testimony was perjured or that he misinformed the court, such acts or statements do not constitute extrinsic fraud but are intrinsic. Extrinsic fraud has been defined as that which has prevented a contestant from presenting his case to the court and does not apply to matter actually presented and considered. (*Zaremba v. Woods,* 17 Cal. 2d 309 (61 P. 2d 976); *O. A. Graybeal Co. v. Cook,* 16 Cal. App. 2d 231 (60 P. 2d 525); *Hammell v. Britton,* 19 Cal. 2d 72 (119 P. 2d 333); *Estate of Robinson,* supra.) It must be admitted that the facts and circumstances of the present case do not come within such definition.

"The order appealed from is affirmed."

One interesting observation might again be made at this point. Appellant herein appears to have arrived on the scene as owner of the assigned claim sued on here about May, 1950. Appellant's predecessors admittedly learned of both the San Francisco probate proceeding and the Los Angeles petition for letters at or about that time. Therefore, it is obvious that while she charges the direst forms of fraud and misconduct, it is obvious that such acts charged would not have the slightest effect upon her or her course of action or even that of her predecessor's in interest, even if committed as she alleges.

FILING OF SECOND PETITION FOR LETTERS OF ADMINISTRATION IN LOS ANGELES WAS NEITHER INTENDED, NOR DID IT IN FACT CONSTITUTE A FRAUD ON APPELLANT OR HER PREDECESSORS.

The second petition for letters was filed in Los Angeles only because appellee appreciated the fact that the San Francisco Superior Court might find that Edward Cebrian, having lived for a time and died in Los Angeles County, was a resident of that county at the time of his death. In such an event defendant would be able to proceed without delay to seek letters in the southern county. Due to the fact that the San Francisco Superior Court adjudged that Edward Cebrian's residence (domicile) was in San Francisco, it became, of course, unnecessary and in fact *impossible* for her to proceed further in Los Angeles.

In the hundreds of pages of pleadings and briefs which have been prepared and filed in this case, appellant has demonstrated a resourceful and imaginative approach to the law and facts. But in all this mass of words there is not one bit of proof or convincing argument that appellee had any thought, motive or intent when she filed her second petition in Los Angeles, other than as testified by her and set out above. (Defendant's Deposition, Exhibit "B" page 15.)

What would a person who had conceived a design to conceal and hide the probate administration of Edward Cebrian's estate from his creditors have done? Would he have spread on the public records of *two counties,* over his attorney's name and office address, the fact of Edward's death and his desire to be ap-

pointed administrator? Of course not! Appellant contends Los Angeles was the logical place for creditors to make inquiry into Edward's affairs. We submit that for creditors of the antiquity of appellant's alleged predecessors both San Francisco and Santa Barbara Counties would have been more logical choices. There is no evidence any of them were ever in Los Angeles or ever knew Edward Cebrian lived there. But be that as it may, appellee in filing in Los Angeles did the one thing which was the least prudent if she had really had any thought of keeping Edward's creditors off the scent. She gratuitously spread before them the very sign post followed years later by Charles J. Colville, appellant's deceased husband, when he set about looking into Edward's history. It is true there were other sign posts leading to San Francisco, such as an old 1934 bankruptcy proceeding, which Edward Cebrian had filed in Santa Barbara County or farmer-debtor composition.

But by some curious process of reasoning the contention is made that appellee defrauded her brother's creditors by filing the Los Angeles petition, when by not filing it at all, they would all have been deprived of the very avenue of inquiry which appellant subsequently employed.

The fact of the matter is appellee never dreamed in 1945 that Edward Cebrian still owed obligations he might have incurred in the early 1930's in Kentucky. She knew generally he had been in a bankruptcy proceeding in 1935, but had and has a most imperfect understanding of the nature of that proceeding, ex-

cept that when it was all over in 1938 Edward Cebrian had lost the Cuyama Rancho.

Fraud to be actionable must, of course, have had some effect upon the rights of the person who claims to be defrauded. We assume then, solely for the purpose of argument, that a finding of fraud, either intended or unintended, actual or constructive, intrinsic or extrinsic, could be supported by the evidence in this case. Even so, appellant must still plead and prove that the filing of the Los Angeles petition prevented her, or her predecessors, from filing a probate claim before August 27, 1945, when the time for filing claims expired. We submit there is neither pleading, proof or inference deducible from proof that the various alleged predecessors of appellant and her husband, who apparently all lived and died in Kentucky, ever heard of appellee or her two petitions, must less were defrauded thereby.

While it might be conceded that the filing in Los Angeles involved time and expense not justified by the saving of a few days, it certainly did not possess the venality to draw forth the consequences appellant seeks to vest it with.

WAS ALLEGED FRAUD INTRINSIC OR EXTRINSIC?

Further study of this question convinces us that this question of law can be divided into two parts for clearer study.

(A) Was the preparation and filing of a petition for probate in San Francisco Superior Court a fraud

upon the rights of appellant or her predecessors, assuming no second petition had ever been filed in Los Angeles.

We doubt if the question of where a wanderer resides and has his permanent domicile is ever so obvious *prior to a determination by a court,* that it can be fraudulent for a relative to make an allegation as to such person's legal domicile in sincere accord with the affiant's belief. And no one can read all of appellee's deposition and doubt that *in her mind,* both in 1945 and now, she believes Edward Cebrian's permanent home was in San Francisco all of his life.

Yet appellant contends that voting (which appellee did not know about in 1945) and physical presence with some possessions is so *conclusive* as to Edward Cebrian's Los Angeles residence that it was active fraud for appellee even to allege otherwise.

The final order made in San Francisco Superior Court on February 26, 1945, appointing appellee administratrix was a conclusive determination of the jurisdiction of the Court, including the residence of Edward Cebrian in San Francisco.

Section 302, Probate Code of California.

The statute is prefaced by the clause "In the absence of fraud in its procurement". It has been settled in California that the "fraud" referred to in that section is "extrinsic", and not intrinsic fraud.

Estate of Robinson, 19 Cal. (2d) 534 at 539, 121 P. 2d 734.

Except for being a much stronger case, we submit the facts of the *Crisler* case cited above demonstrate

that any action by appellee could not possibly constitute "extrinsic" fraud. No act by her prevented appellant, or her predecessors, from appearing and filing their alleged claims within the time allowed by law. No such cause and effect relation between their failure and her acts has been shown. Under the law no such connection *can* be shown.

In re Griffith (1890), 84 Cal. 107 at 112-113, 24 P. 381, was another probate matter in which one Gambetta was alleged to have sought letters of administration in San Joaquin County, knowing the decedent was a resident of Alameda County, and knowing also that his name appeared in the great register of Alameda County, all without disclosure to the Probate Court. The Court held this question of fraud alleged to have been committed was not extrinsic or collateral, but pertained to the precise matter before the Court: the residence of the deceased. The decision is based upon the United States Supreme Court case of *U.S. v. Throckmorton,* 98 U.S. 61, which it quotes as follows:

> " 'The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered.' The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy."

To the same effect is *Holabird v. Superior Court,* 101 Cal. App. 49 at 52-53 (281 P. 108), quoted and discussed above.

EXTRINSIC FRAUD.

One of the leading cases in California dealing with the distinction between extrinsic and intrinsic fraud is *Pico v. Cohn* (1891), 91 Cal. 129, 25 P. 970, 27 P. 537. There one Pico sought to set aside a former judgment which Cohn had obtained against him. It was subsequently discovered that this judgment was obtained largely because Cohn had bribed one Johnson, an eye witness. The fraud of Cohn suborning perjury was held to be intrinsic and the judgment, having become final, the demurrer to the suit in equity to set it aside was sustained. The discussion of this point is found beginning at page 133 of 91 Cal. We refrain from selective quotation in order not to spoil the continuity of the Court's reasoning.

But from the *Pico* case and many subsequent cases we can, by example, determine what does constitute extrinsic fraud which entitles the party defrauded to be relieved from a decree so obtained.

(A) Keeping an unsuccessful party away from the Court by a false promise of compromise.

(B) Keeping a party in ignorance of a suit.

(C) Where an attorney fraudulently pretends to represent a party, but connives in his defeat.

Baker v. O'Riordon, 65 Cal. 368, 4 P. 232.

(D) Where an attorney fraudulently sells out his client's interest.

(E) Where false affidavits of service of summons or citation are made, no service being made.

Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

(F) Where a person *knowingly* omits the names of heirs at law from a *petition for probate* of a will, so that they receive no notice, as required by law.

Zaremba v. Woods (1936), 17 Cal. App. 2d 309, 61 P. 2d 976;

Probate Code of California, Sections 326, 328.

But see

Mulcahey v. Dow (1900), 131 Cal. 73, 63 P. 158, and

Lynch v. Rooney (1896), 112 Cal. 279, 44 P. 565, where omitted heirs are held barred by the *decree of distribution.*

(G) Where the party guilty of fraud so misrepresented facts as to prevent the victim from discovering the earlier fraudulent acts which were the basis of the cause of action.

Caldwell v. Taylor (1933), 218 Cal. 471, 23 P. 2d 758, 88 A.L.R. 1194.

(H) Where a personal representative of a decedent wilfully suppresses material facts in bad faith for the purpose of preventing creditors from enforcing their rights.

See

Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 P. 2d 1019.

Bad faith is an essential element in any suit to charge a defendant with guilt for fraudulent acts or omission.

(I) Where a plaintiff had a defense and counterclaim but relied on the defendant's representation that

if she did not defend he would hold the property in trust for her.

Flood v. Templeton, 152 Cal. 148, 92 P. 78.

The quotation of general language and even definitions on the question of whether an established fraud is extrinsic or intrinsic is of little help without a careful study of the facts of each case.

There are some factors which can be distilled from the cases which aid in the determination.

1. The party charged with the fraud must have wilfully and in bad faith performed some act or failed to perform some duty imposed upon him by law, which prevented some person affected by the judgment or order from having his or her day in Court.

Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 P. 2d 1019;

Caldwell v. Taylor (1933), 218 Cal. 471, 23 P. 2d 758.

Thus in *Sohler v. Sohler* (1902), 135 Cal. 323, 67 P. 282, and in *Campbell v. Campbell* (1907), 152 Cal. 201, 92 P. 184, we have two instances where the party charged with fraud was the mother and natural guardian of minor children who were victimized by her fraud. It was the duty of such mother and natural guardian to represent their interests in the probate proceedings involved, rather than to falsely and fraudulently deprive them of their inheritances at a time when they had no ability or opportunity to defend themselves.

2. The fraudulent act must have been performed for the purpose and with the intent of gaining an

advantage over the party who is deprived of an opportunity to present his case.

In this connection we submit that the evidence disclosed in this case shows with abundant reason why appellee and her counsel believed in 1945 that none of the debts scheduled in Edward Cebrian's 1934 bankruptcy proceeding were still enforceable, as over ten years had elapsed. The statute of limitations, it was reasonable to assume, had long since barred all such claims, if any remained unpaid. The vigorous defense urged here that the note in suit is barred supports this view. Without knowledge or belief that the note in suit or any of the other "so-called" Kentucky debts remained enforceable, it certainly cannot be said appellee formed any fraudulent scheme to keep such claimants in ignorance of their rights.

3. The alleged fraud must, of course, *actually* have been effective to deprive appellant and her predecessors from having their day in Court.

Assuming that only in Los Angeles County could any valid probate of Edward Cebrian's estate occur, as appellant contends and we dispute:

Appellant must show as a minimum requirement to her prayer for equitable relief that solely by reason of the San Francisco filing her predecessor was prevented or hindered from filing his claim in probate.

The absolute absence of evidence on this score is most eloquent. The evidence suggests the contrary conclusion. It appears that the holders of the note in suit were in a state of complete slumber so far as this

asset was concerned from 1938 until Mr. Colville stirred them up in 1950, or thereabouts.

Where then is any basis for relief if, conceding all else, appellant cannot show that the alleged fraudulent acts of appellee did in fact prevent her predecessors from enforcing their rights?

Rather the Court is asked to speculate that *if* the probate proceeding had proceeded in Los Angeles the holder of the note would have been "presumed" to have learned of it in time to file his claim in time. The inference must be drawn that it would have made not the slightest difference to the holder of the note where in California appellee sought administration.

Memory does not serve appellee's counsel as to any creditor of Edward Cebrian who was in the Los Angeles area, either in 1934 or 1945.

Gale v. Witt, 31 Cal. 2d 362, 188 P. 2d 755.
(Alleged false testimony as to witnessing of a will offered for probate.) Since it was one of the material issues decided in the petition for probate, such false allegation was held to constitute intrinsic, not extrinsic fraud, and to afford no relief in equity.

Lynch v. Rooney, 112 Cal. 279, 44 P. 565.
A finding in a decree of distribution as to who was the legal heir is binding and cannot be set aside in a separate suit in equity by other heirs wrongfully omitted. The fraud or mistake was intrinsic.

Mulcahey v. Dow, 131 Cal. 73, 63 P. 158.
Omitted heirs sought in vain to have a widow of their relative declared an involuntary trustee following a

decree of distribution of the relative's estate. It will be noted the omitted heirs lived in other states and had only constructive notice of the proceeding.

In Colville v. Koch it will be remembered that notice of the filing of *both* petitions for probate was given by defendant to the whole world in the only manner recognized by law. She therefore had no duty or opportunity, even if she had known of the note in suit to give the holder any other notice.

5. The party seeking to be relieved from the effect of the judgment or order must demonstrate that his own negligence or laches did not contribute materially to the result.

Appellant's proof reveals a complete absence of any activity on the part of her predecessors regarding the Cebrian note from 1938 until 1950. They apparently did not even bother to communicate with their California counsel during all this time.

Was it not this very failure to do anything whatever to keep in touch with their alleged debtor or inquire as to his assets or whereabouts that accounts for appellant's predecessors in interest failure to file a claim, not any activity appellee is alleged to have engaged in? We emphasize, it is whether the holders of this note were or were not misled or hindered by appellee from filing their claim that is of import here. It matters not whether Cebrian's creditors generally might have known or would have "presumed" that Edward Cebrian's probate proceedings were in Los Angeles.

For all that appears here no holder of the Cebrian note in suit ever knew or heard that Edward Cebrian ever lived in Los Angeles until 1950 or later.

It does not appear that he ever owned real estate in Los Angeles, although the holders of the note knew that he owned land in Santa Barbara, San Luis Obispo and Yolo Counties. All this land was scheduled in his bankruptcy estate.

Appellee feels that the cases, *In re Griffith,* 84 Cal. 107, 24 P. 381; *Estate of Crisler,* 83 Cal. App. 2d 431, 188 P. 2d 772, and *Estate of Robinson,* 19 Cal. 2d 534, 121 P. 2d 734, are so nearly parallel in point of fact as well as principle, that they are controlling here.

We submit:

(i) The alleged acts of appellee, even if fraudulent, had no effect either to prevent appellant's predecessors from appearing to contest the finding as to residence or from filing a probate claim;

(ii) The appellee did no act, and refrained from doing no act, which by law she was bound to do at the time she filed her petition for probate in San Francisco, which in any way hindered, misled, deceived or prevented appellant's predecessors from appearing in the probate proceeding.

Earlier we stated the question of whether the alleged fraud be extrinsic or intrinsic could best be explored under two different factual premises. So far we have discussed at some length the question whether the filing in San Francisco alone was a fraud on appel-

lant's predecessors. Our conclusion is, of course, that it was not.

B. Now we turn to the second proposition: Did the filing of the second Los Angeles petition constitute an extrinsic fraud against the holders of the note in suit?

The very fact that *something* pertaining to Edward Cebrian, setting forth the fact of his death, his habitation in Los Angeles at the time of his death, and the fact that he left estate in California, cannot to our mind indicate a desire to conceal, hide, hinder or mislead creditors of Edward Cebrian. They were certainly no worse off than if no petition had ever been filed there. Appellant's argument that the filing was a carefully contrived blind alley to lead creditors who might examine it to terminate their inquiry is not only not the fact, but not worthy of serious consideration. The Los Angeles petition alleges that Edward Cebrian left an estate. To suggest that a creditor would be so naive as to abandon his claim without so much as a letter to the appellant or her counsel merely because no further papers were filed, is not realistic.

The issue involved is this: it must be shown that some prior owner of the note *did* see the Los Angeles file and was, in *reason,* misled thereby so as to fail to file a claim in the San Francisco proceeding. The absence of any such showing is only too obvious and is fatal to plaintiff's case.

We respectfully submit appellant has not sustained the burden of proof on the fraud issue.

ANALYSIS OF APPELLANT'S ARGUMENT RE: FRAUD.

Appellant avers the law will *presume* a causal relationship between an alleged fraudulent act and some detriment an adversary sustains.

Appellant's Brief, XII, page 20.

The statutory citations there set forth do not even pertain to a presumption of fraud, much less support the contention advanced.

The case of *Beckett v. Selover* (1857), 7 Cal. 215, 237, appears to aid appellant until we find it has been criticized and overruled. It certainly does not now set forth the law of California. In the first place, the *Beckett* case was decided in 1857. By the Act of March 27, 1858 (1858 Statutes, 95) it was provided that the proceedings of Courts of probate shall be construed in the same manner and with like intendments as proceedings of Courts of general jurisdiction, and the records, judgments and decrees of such Probate Courts shall have accorded to them like force and effect and legal presumptions as the orders and decrees of the District Courts.

Secondly, in *Irwin v. Scriber* (1861), 18 Cal. 499, it is said at page 503:

> "The only question presented in this case is, whether it can be collaterally shown against the grant of administration upon an estate made by the Probate Court of one county, that the Court had no jurisdiction, by showing that deceased had not her last place of residence in that county."

The *Beckett* case, cited, quoted and relied on by appellant, was swept aside by the following language from the opinion in the *Irwin* case:

> "It is scarcely disputable that a judgment of the District Court could not be collaterally impeached by showing that the party really was not in the county or served with process; or that a judgment of the United States District Court could be assailed collaterally by proof that the plaintiff was not really a resident of a different State from that of the suit, or not an alien, etc. The same presumptions in favor of the jurisdiction now attach in favor of the Probate Court, as obtain in either of the Courts mentioned. Independently of the statute, it is, to say the least, extremely questionable whether this sort of collateral attack is admissible, although some countenance is given to it by the case of *Beckett v. Selover* (7 Cal. 215). The danger of such a doctrine is forcibly illustrated by Mr. Justice Roosevelt, in *Monell v. Dennison* (17 How. P. 426). He says: 'Where the jurisdiction of a subordinate tribunal, having cognizance of the general subject, has attached by the presentation of a verified *prima facie* case, and by the appearance of the parties, its decision, even on a quasi jurisdictional fact, such as that of inhabitancy, must be conclusive, unless reversed on appeal. To allow it to be called in question collaterally, and on every occasion and during all time, would be destructive of all confidence. No business in particular depending on letters testamentary or of administration could be safely transacted. Payments made to an executor or administrator,

even after judgment, would be no protection. Even if the debtor litigated the precise point, and compelled the executor to establish it by proof, the adjudication would avail him nothing should a subsequent administrator, as in this case, spring up, and after the lapse of a fifth of a century, demand payment a second time, when a scintilla of evidence on one side remained and all on the other had perished. A large number of titles, too, depend for their validity on decrees of foreclosure, and these decrees are often made in suits instituted by executors, or administrator, or their assigns. Must these, too, be subject to be overhauled at any period, however remote, on the nice question of residence?—a question often difficult to decide where the facts are clear, and much more so, of course, where the facts are obscured by lapse of time and loss of documents and witnesses. The doctrine contended for by plaintiff, and indispensable to his success, is, I think, altogether too dangerous for judicial sanction.'"

(Pages 504-505.)

The language also has particular application we feel to the facts of Colville v. Koch.

Again, in *Stevenson v. Superior Court* (1882), 62 Cal. 60, at 62, the Court said:

"This case—*Beckett v. Selover*—in so far as the question of the residence of the deceased at the time of death is concerned, was overruled *and we think rightly so,* in the subsequent case of *Irwin v. Scriber,* 18 Cal. 499."

Appellant cites *United States v. Carter* (1910), 217 U.S. 286, 305, 54 L. Ed. 773. In this case an army captain received illicit and secret gains and profits through collusion with contractors in connection with government contracts. The Court found that the officer had in fact defrauded the government, and that his principal, the United States government, had suffered great loss. (54 L. Ed. 773.) A casual study of this case will reveal the complete dissimilarity of facts from Colville v. Koch.

At eight places in her brief appellant cites *Hewitt v. Hewitt,* 17 F. (2d) 716, decided by this Court of Appeals in 1927. This emphasis justifies an analysis of the facts and applicable law. Both the *Hewitt* case and the instant case involve an administratrix and a probate proceeding in California. Both involve diversity of citizenship. But here the similarity ceases.

In the *Hewitt* case the administratrix was the widow of her intestate. She *knew* that he had an adopted son, although she didn't know where he was. As the adopted son (the plaintiff) was an heir of the decedent he had a specific right to notice of the probate proceeding to be given by personal service or mailing under the provisions of Sections 328 and 441 of the Probate Code of California. Furthermore, the petition for the probate of a will must state the names, ages and residences of the heirs, devisees and legatees of the decedent so far as known to the petitioner. (Sections 326 and 440, Probate Code.)

In the *Hewitt* case the widow, or administratrix, knew of the adopted son (plaintiff) and had seen his name in some of the decedent's wills. She did not, however, set forth his name and relationship in her petition for letters of administration (Section 440), and consequently he did not and could not receive the notice of the hearing thereof which the law expressly requires. (Section 441, Probate Code.) It appears further that Mrs. Hewitt at no time notified the Court or her attorney of the fact that there existed an adopted son, who by law was entitled to one-third of his father's estate.

The failure of the defendant-administratrix in the *Hewitt* case to discharge the duty expressly enjoined upon her by law obviously enriched her by increasing her apparent share of the estate and damaged the plaintiff by depriving him of the one-third share to which he was, of course, entitled.

The Court of Appeals made it clear that since plaintiff was actually deprived of his share of the estate by the fraudulent concealment of his identity by the defendant-administratrix he was entitled to a decree as prayed. It was obvious that had the Probate Court known of a third heir it would not have distributed the estate to the defendants.

It was the *plaintiff's* very property which the defendants had received. He had succeeded to it immediately on his father's death by operation of law. (Probate Code, Section 300.)

The classical examples of extrinsic fraud are set forth in the opinion as they are elsewhere in this brief.

Let us compare the actions and legal obligations of the administratrices Hewitt and Koch. Appellant here is, of course, a creditor, not an heir of Edward Cebrian.

Mrs. Koch did not know of the note sued on here, the alleged payee thereof or any subsequent holder when she started the probate of the Edward Cebrian estate ten years ago.

Koch Deposition, page 16, lines 6-11;
Koch Deposition, page 12, lines 19-24.

As administratrix of the Edward Cebrian estate Mrs. Koch was obligated to do two things and only two things with respect to creditors:

(i) She was obligated to give notice to the whole world of the hearing of her petition for letters of administration.

Probate Code, Section 441.

(ii) She was obligated to give *notice to creditors.*
Probate Code, Section 700.

Mrs. Koch fully performed both these duties.
(R. 26, Finding 12; R. 28, Finding 17.)

Neither statute nor reason imposed upon Mrs. Koch the duty of doing more with respect to the creditors of the Edward Cebrian estate, particularly when she had no knowledge or reason to suspect there were outstanding these claims against her brother.

In the absence of any failure to discharge a duty imposed upon her by reason or law, we submit that, even had she known of outstanding obligations, she, as administratrix, was under no legal or moral obligation to solicit claims against the estate and warn creditors of the passage of the time within which claims must be filed.

In the light of the facts of the *Hewitt* case we can well understand the reasoning, and find it entirely consistent with a long line of California cases to the same effect.

Furthermore, we point out that appellant is an alleged holder of an unsecured claim, not the actual owner of the assets held by the appellee, as was the plaintiff in *Hewitt v. Hewitt.* Nor does appellant hold in her own right the assets of the Edward Cebrian estate, since, except for sums distributed on partial distributions, appellee here holds said assets only in her capacity as administratrix.

The recent case of *Wolfsen v. Smyth,* 223 F. 2d 111, also decided by this Court, is relied on by appellant. Again, however, the factual distinctions are not noted. The *Wolfsen* case dealt solely with the deductibility for federal estate tax purposes of a claim which had been allowed by a California Probate Court, even though (like the Colville note) it was clearly barred by the statute of limitations. The administrator who approved the outlawed claim and submitted it to the Probate Court for approval was actually the *creditor,* by virtue of an assignment from

the original payee of the note. The case involved the federal statutes and regulations relating to the deductibility of claims allowed against an estate. The allowance of the barred claim was expressly prohibited by state law (Probate Code, Section 708) and, therefore, of no effect on the issue of deductibility under the Regulations (105 Section 81.30) quoted in the opinion.

As attorneys practicing in California Probate Courts well know, claims are presented for allowance "ex parte". No notice is given, no hearing is necessary. Far different from the hearing on Mrs. Koch's petition for letters of administration of her brother's estate. There notice had been given to the whole world. The case was regularly called in open Court and heard. The testimony was taken down in shorthand. Witnesses were sworn. Matters heard in probate on verified petition, with notice given as required by law, are not, as appellant claims "ex parte". We have none of the factors of wrongdoing and collusion referred to in the *Hewitt, Wolfson* and *Newman* cases. (*Newman v. Commissioner,* 222 F. 2d 131.)

On examination we find the cases *Diamond v. Connolly,* 251 Federal 234, and *Patterson v. Dickinson,* 193 Federal 328, involve situations similar in principle to the *Hewitt* case: that is, the personal representative of a decedent, by fraud, secured the distribution to himself to the detriment of the true heirs. Under well settled rules constructive trusts were imposed on the wrongdoer.

Appellant has also cited the following California cases as support for her position:

Caldwell v. Taylor (1933), 218 Cal. 471, 23 Pac. 2d 758;

Bacon v. Bacon (1907), 150 Cal. 477, 89 Pac. 317;

Campbell v. Campbell (1907), 152 Cal. 201, 92 Pac. 184;

Sohler v. Sohler (1902), 135 Cal. 323, 67 Pac. 282.

Each of these cases, however, we find involve heirs who have been deprived of their rightful inheritance by some fraud practiced by the personal representative of the decedent which prevented the wronged heir from learning of his rights and making timely claim therefor. In other words, as in the *Hewitt* case (17 F. 2d 716) we have situations of extrinsic fraud, absent in the instant case.

> "An analysis of the authorities upon the question of what fraud will warrant the aid of equity indicates that only upon proof of extrinsic and collateral fraud can plaintiff seek and secure equitable relief from the judgment. A showing of fraud practiced in the trial of the original action will not suffice. The authorities hold this to be intrinsic fraud, and uniformly hold that since there must be an end to litigation, and the fraud was part of the case presented in the former action, equity will not reopen the litigation. The leading case of *United States v. Throckmorton,* 98 U.S. 61, 65 (25 L. Ed. 93), so holds."
>
> *Caldwell v. Taylor,* 218 Cal. 471 at 475-476 (23 Pac. 2d 758).

In the absence of such extrinsic fraud it is obvious a final decree of a Probate Court cannot be avoided in equity, regardless of whether we call it a "direct" or a collateral attack. The express well supported finding of the trial judge here was that no fraud, extrinsic in character, with respect to the probate proceedings was committed by the defendant-appellee. (R. 21; R. 30, Conclusion IV.)

Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317, was a case in which there was a mistake which deprived plaintiff of $8,000, since in her actual legacy of $10,000 the "ten" was read as "two" in the original reading of the handwritten will. Plaintiff was not present, however, and in no way negligent or responsible for the mistake. The mistake was made by her husband and other persons having fiduciary responsibilities to her. They profited to the extent she suffered by their mistake. (page 489.) The opinion contains an exhaustive discussion of the law and the well defined distinctions between extrinsic or collateral fraud or mistake for which equity gives relief and intrinsic fraud, for which no such relief through collateral attack is afforded. The Court said at page 483 of 150 Cal.:

> "*Lynch v. Rooney,* 112 Cal. 282 (44 Pac. 565), was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. (*Pico v. Cohn,* 91 Cal. 133 (25 Am. St. Rep. 150, 25 Pac. 970, 27

Pac. 537); *United States v. Throckmorton,* 98 U.S. 65.)"

One of the most flagrant instances of extrinsic fraud practiced by a fiduciary upon an heir is *Campbell v. Campbell,* 152 Cal. 201, 92 Pac. 184. There the wife of James Campbell was his administratrix and the mother of the minor plaintiffs who lived in Hawaii. They were divested of their rights as heirs in valuable hotel properties in San Jose through wholly fraudulent probate sale proceedings. The mother was not only the fiduciary (administratrix) for all heirs but also the natural guardian of her minor children under obligation to protect their rights. The Court concluded by saying such conduct "clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief". (152 Cal. 210.)

Another extrinsic fraud case is *Sohler v. Sohler,* 135 Cal. 323, 67 Pac. 282, where, as in the *Campbell* case, minor pretermitted heirs were defrauded by their own mother. The plaintiffs' natural guardian, their mother, while representing them in that capacity wrongfully caused a share of the estate to be distributed to another child of hers who was no relation to the decedent. After stating that the Court could grant plaintiffs relief only if the fraud were extrinsic to the probate distribution, and not if the fraud were intrinsic, the Court said at page 326 of 135 Cal.:

> "But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the

estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But, as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring."

These and many similar cases cited do not support appellant's views, notwithstanding the careful selection and quotation of language from the opinions without statement or reference to the factual problem before the Court.

CALEDONIA FARMS—YOLO COUNTY.

The major asset of the Edward Cebrian estate was and is a one-half interest in Caledonia Farms. From the date of his death in 1944 to 1948 this asset was held in trust for the heirs by a stranger to this action, now deceased. (R. 62-3; Defendant's Exhibits D-1, D-2, D-3 and D-4.)

The trustee did not make a conveyance of the legal title to the beneficiaries of the trust until her claims

for advances made for taxes, assessments and operating expenses were paid in 1948. (R. 67.)

Caledonia Farms was listed by Edward Cebrian as an asset in a farmer-debtor proceeding he brought in 1934 under the Bankruptcy Act. (Plaintiff's Exhibit 22; R. 76.)

By some process of reasoning we do not follow, the history of Caledonia Farms was injected into the case and toward the end of the trial much testimony and many exhibits were offered relative to it.

We cannot be drawn away from the issues of this case by false leads, but appellant has devoted several pages of her opening brief to this asset and its history as an "extrinsic factor".

To this we can only observe: (i) There is not a word in plaintiff's complaint about Caledonia Farms. (ii) This appellee did not "conceal" it from creditors or any one else, since she did not and could not obtain legal title to it until she was able in 1948 to pay to the trustee the several thousands of dollars the trustee had advanced from her own funds to pay delinquent and current taxes and other assessments. (iii) Appellee certainly can not be blamed if Hugh Weldon, the Santa Barbara attorney who represented *appellant's predecessor,* failed to properly notify his principal in Kentucky about Edward Cebrian's assets which were listed in the bankruptcy file of which he had knowledge. (R. 76.)

In short, the entire reference to Caledonia Farms is irrelevant. It is ridiculous to say appellee as admin-

istratrix was under a duty to call this asset to the attention of creditors of whom she had no knowledge whatever. (Koch Deposition page 12, lines 19-24.)

This asset, less portions which have been sold, is still in the estate of Edward Cebrian being administered by appellee. Nothing set forth by appellant relative to this land has the slightest bearing upon or causal relation with the failure to file a creditor's claim. Nothing set forth in relation to it gives rise to the slightest inference of fraud on the part of appellee, actual or constructive, intended or otherwise.

APPELLANT AND HER PREDECESSORS HAD CONSTRUCTIVE NOTICE OF SAN FRANCISCO PROBATE PROCEEDINGS.

In asserting plaintiff-appellant did not have constructive notice of the San Francisco probate proceedings she asserts a position untenable under California law. The reverse is established by a long line of California authorities and the point requires no argument.

20 *Cal. Jur.* 2d 76, Sec. 41.

In *Abels v. Frey,* 126 Cal. App. 48, 14 P. 2d 594, the Court said at page 53:

> "The jurisdiction of the probate court is a jurisdiction *in rem,* the *res* being the estate of the decedent which is to be administered and distributed with regard to the rights of creditors, devisees, legatees and all the world. (*Warren v. Ellis,* 39 Cal. App. 542 (179 Pac. 544); *Nicholson v. Leathem,* 28 Cal. App. 597 (153 Pac. 965, 155 Pac. 98).) By giving the notice prescribed by

> the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate, and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appears and presents his claim, or fails to appeal, the action of the court is equally conclusive upon him, 'subject only to be(ing) reversed, set aside, or modified on appeal'. The decree is as binding upon him if he fails to appear and present his claim, as if his claim, after presentation, had been disallowed by the court."

That the statutory notices provided for in the Probate Code of California give constructive notice to all persons, residents of California, and non-residents, was established in *Estate of Davis* (1902), 136 Cal. 590, 69 Pac. 412, where on page 595 the court said:

> "A proceeding relating to the probate of a will is essentially one *in rem,* and a statute providing for a constructive notice by publication or posting gives notice to the world. (*Crall v. Poso Irrigation Dist.,* 87 Cal. 147.) Viewing this matter in the light of constitutional law, it is not necessary that there should be a personal notice served upon any one."

The Court went on to say that the petitioner who was a non-resident of California was notified of the hearing of the probate petition in common with all other interested parties by virtue of the constructive notice given by publication and posting of the notice.

There is an interesting parallel between this *Davis* case (136 Cal. 590, 69 Pac. 412) and the instant case in this: Colville v. Koch started out as a suit to recover the principal and interest due on a promissory note. (See complaint, R. 7.) Now in the intervening years it has undergone a metamorphosis and we now learn it is a suit by a creditor to impose a constructive trust upon the assets of a decedent's estate being administered in probate. (Appellant's Opening Brief 1.)

In *Estate of Davis,* supra, a will contest turned into a proceeding in equity to impress a trust on property under a Decree of Distribution. The Court said at page 597: "Now the metamorphose sought to be made by counsel in the character of his pleading is very great" and refused to permit such a conversion. Five years later the same parties were again urging the same contentions before the California Supreme Court in *Estate of Davis* (1907), 151 Cal. 318 (90 Pac. 711). Again the fact that the non-resident heir was held bound by the posted and published notice of hearing was affirmed.

The federal courts have recognized this California rule as to constructive notice.

Latta v. Western Investment Co., 173 Fed. 2d 99.

We respectfully submit that the findings of fact and conclusions of law to the effect that appellee was not guilty of any conduct which mislead, deceived or defrauded appellant or her predecessors are supported by substantial evidence in the record.

It follows that the failure to file a creditor's claim in the probate proceedings forever bars any action on the note in suit.

The judgment should be affirmed.

Dated, San Francisco, California,
January 3, 1956.

Respectfully submitted,
CHARLES D. SOOY,
Attorney for Defendant-Appellee.

(Appendix Follows.)

Appendix.

Index to Appendix

		Page
I.	Appellant's suit barred May 15, 1937 (Section 337(1), Code of Civil Procedure)	1
II.	Action barred even if it contains a permanent waiver of statute of limitations, by virtue of California borrowing statute (Section 361, C.C.P.)	11
III.	Plaintiff's cause of action based on fraud is barred by Section 338(4), C.C.P.	25
IV.	Prejudicial laches appears from the complaint and evidence and bars plaintiff's claim	30
V.	Appellant's failure to establish title to promissory note in suit	32
VI.	Place of contracting was Kentucky	34

Table of Authorities Cited

Cases

	Pages
Allen v. Allen, 95 Cal. 184, 30 P. 213	21
Allen v. Allen (1899), 97 Fed. 525	21
Anglo California National Bank v. Klein (1936), 296 N.Y.S. 191	23
Archenhold v. Smith (1920), Texas, 218 S.W. 808	10
Bankers Trust Co. v. Patton (1934), 1 Cal. (2d) 172, 33 P. (2d) 1019	29
Biewend v. Biewend (1941), 17 Cal. (2d) 108, 109 Pac. (2d) 701	22
Blochman Commercial and Savings Bank v. Ketcham (1919), 36 Cal. App. 284, 171 P. 1084	16
Bradbury v. Higginson (1914), 167 Cal. 553, 140 P. 254	27
Coates v. Smith (1949), 95 Cal. App. (2d) 20, 212 P. (2d) 62	29
Cockerell v. Title Insurance and Trust Co., 42 Cal. (2d) 284 (February, 1954), 267 P. (2d) 16	32, 33
Cope v. Anderson (1946), 331 U.S. 461, 91 L. Ed. 1602	21
Crabbe v. White (1952), 113 Cal. App. (2d) 356, 248 P. (2d) 193	28, 30
Dow v. Gould and Curry, S. M. Co. (1867), 31 Cal. 629	35
Gibson v. Rath, 13 Cal. App. (2d) 40, 55 P. (2d) 1219	30
Hobart v. Hobart Est. Co., 26 Cal. (2d) 412, 159 P. (2d) 958	29
Kentucky River Coal Co. v. McConkey (1937), 271 Ky. 261, 111 S.W. (2d) 418	8, 11, 14
Lady Washington Consolidated Co. v. Wood (1896), 113 Cal. 482, 45 P. 809	26
Latta v. Western Investment Co., 173 Fed. (2d) 99 (9th Cir.)	29
Lilly Bracket v. Sonneman (1910), 157 Cal. 192, 106 P. 715	20
McKee v. Dodd (1908), 152 Cal. 637, 93 P. 854	18, 19
McMillan v. Douglas Aircraft (1950), 90 Fed. Supp. 670	21
Naylor v. Anderson (1915), 178 S.W. 620	7

Pages

Owensboro Savings Bank v. Haynes (1911), 143 Ky. 534, 136 S.W. 1004 5

Payne v. Kirchwehm, Ohio (1943), 48 N.E. (2d) 224..... 22
Pratt v. Dittmer (1921), 51 Cal. App. 512, 197 P. 365..... 15

Selden v. Preston, 11 Bush 191..... 19
Sowell v. Federal Reserve Bank (1924), 69 L. Ed. 1041.... 8
Sullivan v. Shannon, 25 Cal. App. 2d 422, 77 P. 2d 498.... 15

Taylor v. Bridger (N.C. 1923), 185 N.C. 85, 116 S.E. 94... 4

Utah State National Bank v. Smith (1919), 180 Cal. 1, 179 P. 160..... 16

Watkins v. Fricks (1953), (Ga.) 78 S.E. 2d 2..... 8
Watkins Co. v. Seawright (1930), 41 Ga. App. 617, 154 S.E. 293..... 7
Western Coal and Mining v. Jones (1946), 27 Cal. 2d 819, 167 P. 2d 719..... 22
Wright v. Gardner, 98 Ken. 474, 33 S.W. 622.....2, 14, 17

Zellmer v. Acme Brewing Co. (1950), 184 Fed. 2d 940..... 21

Statutes

Civil Code of California:
Section 1641 3
Section 1646 .....15, 16, 17

Code of Civil Procedure of California:
Section 337(1) 1, 2, 11, 12, 36
Section 338(4) 25, 29, 30, 36
Section 351 .....19, 20
Section 359 23
Section 360.5 14
Section 361 .....passim

Baldwin's Kentucky Revised Statutes:
Section 412.110 4
Section 413.120 13
Section 413.190 19

Page

General Statutes of North Carolina (1953):
Volume 1 C, Chapter 26-7 and 26-9 4

New York Civil Practice Act, Section 13 23

Texts

11 Cal. Jur. 2d, Conflicts of Laws 16
11 Cal. Jur. 2d, Section 6, page 44 35
11 Cal. Jur. 2d, Section 61, pages 143 and 144 16
11 Cal. Jur. 2d, Section 61, page 145 35
11 Cal. Jur. 2d, Section 92, page 192, Conflicts of Laws 15

Cormack on Conflicts of Laws, 12 So. Cal. Law Rev.:
Pages 335 to 361 16
Pages 347 to 349 16
Page 348 17

Appendix

The argument which follows in this appendix will concern this Court only in the event it were to decide no substantial evidence supports the findings and conclusions of the District Judge.

We consider here only certain special defenses raised by appellee, aside from the main defenses of failure to file a claim in probate and the lack of fraud on appellee's part.

I.

APPELLANT'S SUIT BARRED MAY 15, 1937.
(Section 337(1), Code of Civil Procedure.)

Any action in California on the note payable in Lexington, Kentucky, on May 15, 1933 was barred four years thereafter, on May 15, 1937, unless the note contains a valid waiver of the statute of limitations. If it does contain such a waiver, other statutes of limitations apply as hereafter noted.

Appellant must concede that if the following language:

> "The makers and endorsers of this note and all parties hereto waive presentment thereof for payment, notice of non-payment, protest and notice of protest and dishonor, and diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, * * * ,"

does not constitute a waiver of the statute of limitations under California law, the action was barred by Section 337(1), Code of Civil Procedure of California, long before Edward Cebrian died.

The language does not constitute a waiver of the statute of limitations under Kentucky law and, as we will show, that law is controlling in the matter of interpretation. But the fact is the quoted language does not constitute a waiver of the statute of limitations in any jurisdiction.

In the first place, any one drafting a promissory note who desires to waive the statute of limitations has only to say so in so many words. The note in suit was identical in language with an earlier note made in 1928 in Kentucky, except as to the amount and date of maturity. (Weldon Deposition, page 16, lines 6 to 11; Defendant's Exhibit "A"; Letter dated November 22, 1932 from Hugh Weldon to John S. Barbee. Letter attached to Defendant's Exhibit "A".)

In the second place, the quoted portion will be found to be identical with the language of a form of promissory note used by the appellant's assignor bank in Kentucky. (Defendant's Deposition Exhibit "A" attached to Defendant's Exhibit "A".) Whether or not this explains the source of the language of the note in suit is open to inference. In any event, it appears that it is not unique language but is used in notes payable in the State of Kentucky *where any waiver of the statute of limitations is absolutely void.*

Wright v. Gardner, 98 Ken. 474; 33 S.W. 622.

If we credit Mr. Weldon with authorship of the quoted language of the note we must assume that he, as a California lawyer representing the payee, was competent to include an unambiguous waiver of all statutes of limitations if he had so intended. That he did not believe or intend that the language constituted such a waiver is made apparent by his repeated reference to the fact the statute was running on the note and its predecessors which had the same provision. (Letters attached to Weldon Deposition, Defendant's Exhibit "A".) We believe such contemporaneous declarations by a skilled draftsman are material as probative evidence of the parties' intent to aid in the construction of language which may be ambiguous.

On the other hand, if Mr. Weldon only borrowed the language from the note which was being renewed and we know he did just that, we must credit the creditor in Kentucky, or some agent there, with its authorship. The Kentucky form note referred to almost compels our conclusion that the language in question originated there.

But any waiver of the statute of limitations in Kentucky is absolutely void. (Point II following.)

Therefore, it can not be assumed that the Kentucky draftsman was inserting language of no legal effect. We must attribute meaning to the language, however, if possible. (Section 1641, Civil Code of California.)

And the language quoted has definite meaning when contained in a negotiable instrument. While a payee

has the full statutory period to enforce the obligation evidenced by the note against the maker, he must act very promptly in the event the maker does not pay the obligation at maturity if he wishes to preserve his rights against the endorsers and others only secondarily liable on the note.

Thus only days, not years, are allowed for presentment for payment, notice of dishonor, protest and notice of protest in order to preserve the rights of action against the endorsers.

The meaning of the "waiver of diligence in bringing suit" is most obvious when we consider statutes which require a holder of any note or bond to use all reasonable diligence to recover from the maker (i.e. sue him) under penalty of losing his rights against the endorsers, guarantors and others if he fails to do so.

Thus North Carolina has such a statute and in that state the owner or holder of a note has only thirty days following receipt of notice from an endorser to proceed against the maker.

General Statutes of North Carolina (1953), Vol. 1 C, Chapter 26-7 and 26-9.

See *Taylor v. Bridger* (N.C. 1923), 185 N.C. 85, 116 S.E. 94.

But what is of far more interest here is the Kentucky statute, because we are dealing with a note expressly made payable in Kentucky and the language of which undoubtedly originated there. Thus Section 412.110 of Baldwin's Kentucky Revised Statutes re-

quires a creditor to sue the principal. The statute says in part:

> "If the creditor does not sue to the next term thereafter at which he can obtain judgment, and in good faith prosecute the suit *with reasonable diligence* * * * the co-surety, co-obligor, co-contractor or defendant shall be discharged from all liability. * * * The written notice required in this section shall not be waived unless the waiver is in writing."

Small wonder then that Kentucky notes include a waiver of diligence in bringing suit.

The waiver of diligence contained in the note involved in *Owensboro Savings Bank v. Haynes* (1911), 143 Ky. 534, 136 S.W. 1004, is not verbatim with the language of the note here in suit, but we submit that in legal effect it is identical.

> "In the body of the note sued on is the following agreement: 'The parties hereto, including the makers and indorsers of this note, hereby expressly waive presentment thereof for payment, notice of nonpayment, protest, and notice of protest, and diligence in bringing suit against any party hereto, either maker or indorser.' The rule is that, where the waiver is inserted in the body of the note, it becomes a part of the contract of the indorser, as well as of the maker, and is binding upon the indorser. *Bryant v. Merchants' Bank of Kentucky,* 8 Bush, 43. The question then is: What effect must be given the waiver?"

As to the meaning and purpose of this section the Court said:

"For appellee it is contended that the holder of a note is under no obligation to use diligence as to the maker in order to hold a surety or accommodation indorser liable, and that, therefore, the provision has no reference to such parties. It is also insisted that it is not proper to construe a waiver of the diligence provided by law into a waiver of the statutory right to require the institution of an action. *The language of the waiver is unambiguous. By its terms it applies to an indorser, and to each of the parties to the instrument. One of the things waived is diligence in bringing suit against any party thereto, either the maker or the indorser.* Appellee contends that the waiver itself made him liable at all events, and therefore a surety. He then invokes the statute in question, on the ground that he is a surety. Diligence in bringing suit being the thing waived, it is immaterial whether there is an absence of diligence under the common law, or an absence of diligence after notice given pursuant to the statute. The language is broad enough to include a waiver of diligence, it matters not how the right of diligence may arise. Where a party has contracted away all right to demand diligence in bringing suit, he cannot afterwards give notice under the statute, and insist on that diligence which he has expressly waived. A contract cannot be defeated in this way."

(Pages 1005-1006.)

This case provides the long sought answer to our problem of construction. It must be borne in mind the Kentucky Court was not referring to the statute of limitations which can never be waived there. It

was dealing only with the much more restricted rule of the law merchant that diligence must be exercised where the rights of third parties are involved.

The courts of other states have construed similar waivers. In *Watkins Co. v. Seawright* (1930), 41 Ga. App. 617 (154 S.E. 293), the stipulation was:

> "We the undersigned sureties do hereby waive notice of the acceptance of this agreement and diligence in bringing action against said second party."

The Court held that waiving diligence or promptness in bringing a suit against the principal did not mean acquiescence in the failure to bring any suit at all.

And in *Naylor v. Anderson* (1915), 178 S.W. 620, the note contained this proviso:

> "The makers and endorsers severally waive presentment for payment, protest and notice of protest, and the bringing of suit at the first term of court upon nonpayment of this note after maturity * * * ."

This was held to be a waiver of the defense made available by the statute providing that a surety by notice in writing may require the holder of a contract for the payment of money forthwith to file suit thereon, and that a failure to do so will discharge the surety. The language quoted above simply spells out more precisely what the language in the Cebrian and Owensboro notes (136 S.W. 1004) was intended to accomplish, namely: waive the requirement that suit be brought at once against the maker to preserve the cause of action against any indorsers.

See also *Watkins v. Fricks* (1953), (Ga.) 78 S.E. 2d 2, where the waiver was more specific still and was held valid in Georgia.

The United States Supreme Court in *Sowell v. Federal Reserve Bank* (1924), 69 L. Ed. 1041, considered a note payable in Texas which contained a provision that the maker waived "protest, notice thereof and diligence in collecting". Justice Stone observed that the Negotiable Instrument Law (in effect in Texas) gives effect to such a waiver contained in the body of the note, and that it binds all parties to it.

We feel a study of these cases will reveal the purpose of the language in the note in suit and demonstrate it does not, by intent or accident, create a permanent waiver of the statute of limitations as between the maker and holder.

Finally, as authority for our contention that in no jurisdiction, California included, does the language of the note in suit create a permanent waiver of the statute of limitations, we cite the case of *Kentucky River Coal Co. v. McConkey* (1937), 271 Ky. 261 (111 S.W. (2d) 418). While we rely upon that case and indeed feel that it is controlling by application of the California borrowing statute (Section 361, Code of Civil Procedure, Part II following), in the absence of California cases in point, we feel that it is well reasoned and is entitled to consideration as authority apart from the operation of the borrowing statute.

In the *Kentucky River Coal* case the note contained the provision:

"Endorsers waive demand, protest, and all legal diligence to enforce collection."

The suit was brought against the corporate makers and the endorsers. The endorsers set up the five year Kentucky statute of limitations. As the Court said on page 419 of 111 S.W. 2d:

"We are concerned, therefore, simply with the question of the interpretation to be placed on the words contained in the note on which the suit is based."

The plaintiff contended (as plaintiff contends here) that such language constituted a waiver of the statute of limitations.

In answer to this contention the Court said:

"However, we do not consider the words used to concern the statute of limitations at all. In order to fix the liability of the indorsers, it is ordinarily necessary to make due presentment for payment and to furnish notice of dishonor upon the nonpayment of the instrument in accordance with and at the times required by law. These are matters which may be waived, and, as we interpret the instrument, were all the matters that were waived by the words used. *Liberty Bank & Trust Company v. Hand,* 269 Ky. 342, 107 S.W. (2d) 285. The mere fact that the indorsers waived compliance with the formal steps requisite to fix their liability did not change their characters from parties secondarily liable into makers. The maker is still the party ultimately responsible on the instrument. He could not ask contribution from these claimed co-makers, nor could they thus

procure contribution amongst themselves. The trial court recognized this fact to the extent that he gave judgment to appellee Edwards against his prior indorser, Lisle.

"The case of *Bates' Adm'r. v. Lockery,* supra, is in point. In that case the note contained this provision: 'The sureties, guarantors, and endorsers herein agree to the extension of this note without notice upon payment of interest. The parties to this note generally and severally waive protest and notice of protest.' It was held in that case that the mere acceptance of interest from the principal after maturity without more did not avoid the surety's plea of limitations, and that the words contained in the note did not amount to a waiver of his right to rely thereon.

"there is nothing in the note before us nor in the record from which we can imply a waiver of the statute by appellants. It follows that the trial court erred in failing to sustain the plea of limitations interposed by them, and the judgment against them was improper under the circumstances.

"The judgment is reversed on the original appeal, and affirmed on the cross-appeal."

(111 S.W. (2d) 418 at 420.)

And in *Archenhold v. Smith* (1920) Texas, 218 S.W. 808, the note involved contained this clause:

" 'The makers, sureties, indorsers, and guarantors of this note severally waive presentment for payment, notice of nonpayment, protest, notice of protest, and diligence in bringing suit against any party hereto, and consent that the

time of payment may be extended without notice thereof'."

The entire opinion deals only with the question whether or not the sureties were released due to extensions of time given the maker and because plaintiff-indorsee failed to bring suit at the first or second term of Court as required by Texas statute. It was held they had waived *these requirements.* We cite this case of a very similar note clause to show the exact spirit and meaning of it.

These cases, and particularly the *Kentucky River Coal* case demonstrate, we feel, that the clause in question has a definite purpose, and that purpose is not a general waiver of the statute of limitations, but the far different statutory requirement of diligence in bringing suit against the maker, to hold indorsers liable.

We submit that even if construed by California law, the clause is not a waiver of the statute of limitations. It follows that the shorter four year statute of limitations barred action on this note in 1937. (Section 337 (1), Code of Civil Procedure of California.)

II.

ACTION BARRED EVEN IF IT CONTAINS A PERMANENT WAIVER OF STATUTE OF LIMITATIONS, BY VIRTUE OF CALIFORNIA BORROWING STATUTE. (Section 361, C.C.P.)

The soundness of the point so far discussed by appellee, if accepted by this Court, ends the case in favor

of appellee and all subsequent discussion of law or the facts becomes immaterial.

If the Court finds that the language of the note does constitute a permanent waiver of the statute of limitations, then Section 337(1), Code of Civil Procedure, is not a bar, but Section 361, Code of Civil Procedure, comes into operation and creates a bar to plaintiff's cause of action on the note.

Section 361, Code of Civil Procedure of California, is as follows:

> "Limitation Laws of Other States, Effect of. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

Charles J. Colville was not the original payee of the note but claims to have purchased it in 1950. (Plaintiff's Exhibit No. 17.)

The cause of action sued on here arose in Kentucky because the note was expressly made payable at 200 Trust Building, Lexington, Kentucky. (Plaintiff's Exhibit No. 1.)

Neither Charles J. Colville, nor his widow Wilma Urch Colville, have been, or now are, citizens of California, either at the time the note matured in 1933 or at any subsequent time. They are citizens of Canada. (Plaintiff's Exhibits 18, 19 and 20, and testimony of Wilma Urch Colville.)

Therefore, it is obvious that on every count the plaintiff and her immediate predecessor were not within the exceptions in Section 361, Code of Civil Procedure.

In matters of procedure, including the application of the statute of limitations, the law of the forum is applied.

The law of the forum, California, applicable to this case is Section 361, Code of Civil Procedure. That statute is a firm and clear declaration of the public policy of this State. It clearly prohibits the prosecution of foreign claims by noncitizens of California which are barred by the laws of the place where the cause of action arose. The cause of action arose May 15, 1933 in Lexington, Kentucky, on which day the note matured.

It is the mandate of the California statute (Sec. 361, C.C.P.) that for the purpose of determining whether the statute of limitations is a defense, the law of California applicable to the note in suit is the statute of limitations of the State of Kentucky.

The Kentucky statute of limitations provides that an action on a promissory note, such as the one sued on here, must be brought within five (5) years from the time the cause of action accrued.

> *Baldwin's Kentucky Revised Statutes,* Sec. 413.120.

Thus the note became outlawed under the lex loci contractu on May 15, 1938.

The language of the note regarding diligence in bringing suit does not affect the running of the Ken-

tucky statute of limitations for two very definite reasons.

In the first place, the language does not constitute a waiver of the statute of limitations.

Kentucky River Coal Co. v. McConkey (1937) (Ken.), 111 S.W. (2d) 418,

cited and discussed under our Part I.

Secondly, even if the language did waive the statute, such a waiver is absolutely void in Kentucky.

Wright v. Gardner, 98 Ken. 474, 33 S.W. 622.

During the hearings on various motions argued and briefed in early 1953 appellant argued with much emphasis that a waiver of the statute of limitations is valid in California. If we can assume, in the absence of any California authority, that the language *does* constitute a waiver, the law of California as to the validity of permanent waivers of the statute of limitations made a part of the note itself, is expressly abrogated by Section 361, Code of Civil Procedure, in the case of notes payable in foreign states and not held at maturity by citizens of California.

It might be noted that since 1951 even California has abolished such permanent waivers of the statute of limitations.

Section 360.5, Code of Civil Procedure of California.

It may well be argued, if it were necessary to do so, that that new enactment (C.C.P. 360.5) cut off any right to sue on the note in suit when it was adopted in 1951, or, at most, allowed only a reasonable time

thereafter to file actions on notes such as the one here involved. However, that statute, amended in 1953, appears not yet to have been cited, according to Shepard.

The validity and interpretation of a contract such as the note in suit is governed by the law of the place where the contract is to be performed, which in the case of a promissory note is the place where it is made payable.

Section 1646, Civil Code of California;

Sullivan v. Shannon, 25 Cal. App. (2d) 422 at 426, 77 P. 2d 498;

11 *Cal. Jur.* (2d), p. 192, Sec. 92, Conflicts of Laws;

Pratt v. Dittmer (1921), 51 Cal. App. 512 at 517, 197 P. 365.

The case just cited involved notes signed in California and made payable in Iowa. The Court said:

> *"The notes were payable in Iowa and are to be interpreted, therefore, under the law of that state."*

The question of law there presented for decision was whether or not an assignee of the notes for value was a bona fide holder, notwithstanding his knowledge that the notes were given as consideration for an executory contract not yet performed.

Conflicts of Laws questions regarding the law to be applied to determine the validity of contracts, including even matters relating to the creation of a valid contract (execution facts) are treated in some detail

by the authors of California Jurisprudence, Second, Volume 11, Conflicts of Laws.

The conclusion there reached is that the better reasoned California cases follow the rule (as compelled by Civil Code Section 1646) that the law of the place of performance governs all matters relating to "execution facts". (See Section 61, pages 143 and 144.)

Even stronger argument for the "place of performance rule" is found in the analysis by Professor Joseph M. Cormack on Conflicts of Laws in 12 Southern California Law Review, pages 335 to 361. On pages 347 to 349 he discusses two California cases directly in point. They are:

Blochman Commercial and Savings Bank v. Ketcham (1919), 36 Cal. App. 284, 171 P. 1084

and

Utah State National Bank v. Smith (1919), 180 Cal. 1, 179 P. 160.

In the *Blochman* case a note was made in Mexico with the place of performance left blank. The holder filled in a California city and the Court ruled he had implied authority to do so. Thus the place of performance being in California, the law of California was applied to determine the validity of the note, citing Civil Code, Section 1646. It was invalid in Mexico but valid in California, so judgment for plaintiff was affirmed.

The *Utah Bank* case involved a note signed and delivered in California but by its terms made payable in Utah. This fact was referred to in the decision in

the District Court of Appeal, 26 Cal. App. Dec. 1195. (See, 12 So. Cal. Law Rev. p. 348.) The Supreme Court (180 Cal. 1) held that the law of Utah governed on the question, whether or not the note was negotiable.

Based upon these and other California cases and, of course, particularly on Section 1646, Civil Code, Professor Cormack concludes that in California "the law of the place of performance governs all contract matters" as opposed to the so called "historic" or "splitting up" rule which employs the law of one state for some purposes and another state for other purposes.

Therefore, we come inescapably to the conclusion that the validity and interpretation of the note in suit and, of course, its component parts, must be determined by Kentucky law. On the score of *validity,* any waiver of the statute of limitations is void by Kentucky law. (*Wright v. Gardner,* supra.) Thus such a waiver in a note payable in Kentucky can not be given effect in California. On the score of *interpretation,* the "diligence" clause does not constitute a waiver of the statute of limitations in Kentucky and thus it can not be so interpreted in a California Court.

But even if the Kentucky law were otherwise as to the *meaning* and *effect* of the clause, the California "borrowing" statute, Section 361, Code of Civil Procedure, borrows not only the five year Kentucky statute of limitations but also the Kentucky law as to the invalidity of the waiver of the statute of limitations.

In other words, the borrowing statute makes not only the Kentucky limitation statute, but all Kentucky law *relating* to the defense of the statute of limitations available to appellee in this case as a defense to appellant's claim. It presents an exception to the general rule that the *lex fori* applies its own law as to all matters of procedure, or it may be said that even in such cases as this it is the lex fori that applies as to the procedural question. This is because in this situation the Kentucky law becomes the law of California applicable to this particular case. But, however the courts may characterize the "borrowing", the result is the same and since the action is barred by Kentucky law, it is barred here.

It will be noted that under the California statute (Section 361, C.C.P.) the place of residence of the defendant-debtor is not a factor to be considered, as it is under statutes of some other states which admit the bar of foreign statutes of limitations.

McKee v. Dodd (1908), 152 Cal. 637, 93 P. 854.

In the *McKee* case a cause of action arose in New York where certain promissory notes were payable. The defendant maker had lived in California for less than the applicable California statute of limitations but had moved on to Hawaii where he died. Plaintiff sued his estate on the notes in California. The action would have been barred if brought in Hawaii but it was not barred in New York where the notes were payable. The Court held that for the purpose of applying Section 361, Code of Civil Procedure, it is the place where the cause of action arose, that is

where the breach (non-payment) occurred that is controlling, not the place of the defendant's residence, nor one or more of the several places where he may have resided. Since the action was barred neither in New York where the notes were payable, nor in California, the lex fori, Section 361 was not a bar in the *McKee* case.

At this point we wish to point out that Kentucky has no counterpart of our California Code of Civil Procedure, Section 351. Therefore, the absence of Edward Cebrian from that state, who was never a resident of Kentucky, during all of the intervening nineteen (19) years, does not toll the Kentucky statute of limitations cited above.

Kentucky does have a statute which tolls their statutes of limitations only in the case of causes of action asserted against *residents* of that state.

> *Baldwin's Kentucky Revised Statutes,* Section 413.190.

Even where the creditor is a resident of Kentucky, the nonresidence of the debtor prevents this statute from tolling the statute of limitations.

> *Selden v. Preston,* 11 Bush 191.

In that early case the Court said at page 198 of Vol. 74, Kentucky Reports:

> "It is a plain legal proposition, applicable to the statute of limitations of this state, that where a cause of action exists in behalf of a resident against a non-resident, the mere fact of the debtor being a non-resident will not prevent the statute from running; and it is only in cases where the debtor is a resident, and absents himself from the

> state by removal or otherwise, that the period of his absence will be omitted in the computation of time."

We have shown that regardless of what construction can be placed on the waiver of diligence in the Cebrian note, any waiver of the statute of limitations in Kentucky is absolutely void.

Now we come to the very heart of this problem. We have developed the fact that appellant's predecessor, Colville, would be met by an absolute bar of the statute of limitations if he had commenced this action on the note in Kentucky.

By the express terms of Section 361, Code of Civil Procedure, the action being barred there, is barred here. This statute is a declaration of the policy of this state.

It has been long settled in California that the defense of the statute of limitations is a defense *on the merits.*

> *Lilly Bracket v. Sonneman* (1910), 157 Cal. 192, 106 P. 715.

In that case a note was given which was payable in Massachusetts. An action on the note was barred by the statute of limitations of the state of Massachusetts but the statute of limitations of California had not run. (Section 351, C.C.P.) Nevertheless, the Court applied the bar of the foreign statute as directed by Section 361, Code of Civil Procedure, and held the action was barred in California.

Of course, if the cause of action is not barred by the law of the place where it arose but is barred in

California, the specific California statute of limitation will be applied and there is no need for the application of Section 361, Code of Civil Procedure.

McMillan v. Douglas Aircraft (1950), 90 Fed. Sup. 670 at 673;

Zellmer v. Acme Brewing Co. (1950), 184 Fed. (2d) 940.

We invite attention to the footnote on page 942 of Volume 184 Federal (2d), pertaining to California Code of Civil Procedure, Section 361, where it is referred to as a "change in the lex fori rule".

In *Allen v. Allen* (1899), 97 Fed. 525, the federal court cites an application of Section 361 made by the California Supreme Court in *Allen v. Allen,* 95 Cal. 184, 30 P. 213.

In *Cope v. Anderson* (1946), 331 U.S. 461, 91 L. E. 1602, the United States Supreme Court was called upon to interpret the "borrowing" statutes of Ohio and Pennsylvania. The suits were brought to enforce the shareholders liability of the Banco Kentucky Company. The causes of action arose in Kentucky where the insolvent bank was and by the Kentucky law the same five year statutory period here involved was applicable. The Ohio statute of limitations is six years, as is Pennsylvania's. The opinion of Justice Black concludes that the "borrowing" statutes of Ohio and Pennsylvania must be applied and, therefore, the five (5) year statute of limitations of Kentucky applied to bar the actions.

Even if Kentucky had a statute which tolled the statute of limitations as to *non-residents,* the case of

Payne v. Kirchwehm, Ohio (1943), 48 N.E. (2d) 224, is direct authority for the proposition that even where the debtor has been absent from the foreign jurisdiction where the cause of action arose, the statute of the forum (which applies the law of the foreign state) is not tolled by such absence from the foreign state. In other words, in our case a Kentucky tolling statute (if there were one) would not toll the statutes of limitations of *both* Kentucky and California merely because the defendant debtor was absent from Kentucky but present in California.

There remains one last point to be determined, to-wit:

Where a waiver of the statute of limitations is contained in a note (which we contend is not the fact here), is the operation of the "borrowing" statute, California Code of Civil Procedure, Section 361, foreclosed? Or, in other words, will an exception be read into Section 361 in a case where the cause of action is not barred here solely by reason of a waiver of the statute of limitations, but is barred in the state where the cause of action arose where no waiver of the statute of limitations is valid.

It is well settled that Section 361 can never apply unless the California statute of limitations has *not* run, and the statute of the foreign state has run.

Western Coal and Mining v. Jones (1946), 27 Cal. (2d) 819 at 829, headnote 9; 167 Pac. 2d 719;

Biewend v. Biewend (1941), 17 Cal. (2d) 108 at 115, 109 Pac. 2d 701.

There is only one purpose to be served by statutes such as Section 361. It is to *shorten* the time within which actions can be brought in this state. Its function is as important and its language equally effective in a situation such as that posed by our question and one in which two different statutory periods are involved; that is, where a shorter period of limitation in a sister state has expired and a longer period provided by our code has not yet run.

The courts in California, so far as we can determine, have made no such exception in the operation of Section 361.

We find that this precise point was raised in a New York case *Anglo California National Bank v. Klein* (1936), 296 N.Y.S. 191. A suit was brought in New York against a stockholder of a California corporation to enforce his stockholder's liability. Defendant pled the statute of limitations. New York has a statute similar to Section 361, which is as follows:

> "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of a state or country where the cause of action arose, for bringing an action upon such cause of action, except where the cause of action originally accrued in favor of a resident of this state."
>
> Section 13, Civil Practice Act.

In applying this borrowing statute the New York court held that California Code of Civil Procedure, Section 359, barred the action after three years from

the time the liability occurred. This time had *expired.* The New York court went further and *"borrowed"* also the law of California with respect to the validity of the waiver of the statute of limitations. It found and held that the waiver there involved was valid under California law, even though it would not be valid in New York. The court said on page 201 of 296 N.Y.W.

> "Courts, in construing the effect of statutes similar to section 13 of the Civil Practice Act, which borrow the period of limitation of the state where the cause of action arose, *have generally held that the law of that state applies with respect to other matters affecting the running of the period of limitation.* Mechanics' Sav. Bank v. Fidelity Insurance Trust & Safe-Deposit Co. (C.C.) 91 F. 456; Kelmne v. Long, 184 Minn. 97, 237 N.W. 882; see 35 Columbia L. Rev. 762, 770. The courts of this state have applied the law of the state where the cause of action arose to determine the effect of absence of the defendant from the latter state, Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566; Isenberg v. Rainier, 145 App. Div. 256, 130 N.Y.S. 27; Irving National Bank v. Law (C.C.A.) 10 F.(2d) 721; and to fix the period by which the running of the statute is tolled upon the death of the defendant, Klotz v. Angle, 220 N.Y. 347, 359, 116 N.E. 24. *The purpose of section 13 is to provide that no one can be sued in New York by a non-resident, if at the time he would not be sued in the state where the cause of action arose; if the action is not barred in that state it is not barred in New York so long as it is brought within the time limited by the general statute of limitations of this state.* Isenberg v. Rainier, supra.

"The effect of a waiver of the statute of limitations should, under the circumstances of this case, be determined by the law of the state where the cause of action arose."

Thus we must conclude that this Court should apply California law in this forum (Section 361, C.C.P.) to determine not only whether the statutory period in Kentucky has run (which it has) and also to determine whether or not the provision in the promissory note does constitute a waiver of the statute of limitations in Kentucky and, if so, whether or not it is *valid* in Kentucky. The answer to both latter questions is no.

We submit that appellee, having properly raised the special meritorious defense that Section 361 is an absolute bar to the prosecution of plaintiff's claim in California under the law of California herein outlined, judgment should be in her favor.

III.

PLAINTIFF'S CAUSE OF ACTION BASED ON FRAUD IS BARRED BY SECTION 338(4), C.C.P.

The complaint alleges appellee committed a series of alleged fraudulent acts in February, 1945. This action was commenced November 6, 1952, seven years after the alleged fraud was committed.

A complaint in an action sounding in fraud, which is filed after the expiration of three years from the time the fraud was committed must affirmatively show that plaintiff did not discover the facts constituting

the fraud until within three years prior to commencing the action.

Lady Washington Consolidated Co. v. Wood (1896), 113 Cal. 482, 45 P. 809.

In that case the Court said, pages 486 and 487:

"The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. *It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years.* He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; *and he must also show the times and the circumstances*

under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged; and, as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice of information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, he will be deemed to have had actual knowledge of these facts.* These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. (Martin v. Smith, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135; Hecht v. Slaney, 72 Cal. 363; Moore v. Boyd, 74 Cal. 167; Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219.)."

It is not sufficient merely to allege lack of knowledge of the alleged fraudulent acts beyond the statutory three-year period.

Bradbury v. Higginson (1914), 167 Cal. 553 at 558, 140 P. 254.

Tested by these requirements we find that the plaintiff-appellant's allegation: "13. The plaintiff's predecessors in interest did not learn of the aforementioned acts of fraudulent concealment and intermeddling until after May 20, 1950", is entirely inadequate to bring plaintiff within the exception to the three year fraud statute.

We know that appellant's predecessor Charles J. Colville himself had this knowledge earlier than that date, because as early as 1949 he was prying into the Cebrian estate records. (Defendant's Exhibits "E" and "F".)

There is not even an attempt to plead facts excusing the failure to make an earlier discovery of the fraud relied upon.

This defense does not rest alone on a deficiency in the pleadings. The facts disclosed by the complaint show on its face that the matters which plaintiff claims constitute a fraud *were matters of public record.* Both the petitions for letters of administration filed by Mrs. Koch in 1945 were and are public property. The inquiry which any creditor of ordinary prudence would have launched would have discovered exactly what Mr. Colville discovered. Instead of "concealing" and setting up "false fronts" to mislead creditors, as plaintiff claims, the actions of defendant paved the very way down which Colville travelled.

Thus the two probate files were ready means of knowledge and have been available to plaintiff and all his predecessors for over nine years. Means of knowledge, especially where it consists of public records, as is manifest in this case from the complaint itself, is deemed in law to be knowledge.

Crabbe v. White (1952), 113 Cal. App. (2d) 356 at 360, 248 P. (2d) 193.

For all that appears here, the owners of the note (whoever they were or are) did nothing whatever about the note from 1938 when they corresponded with Hugh Weldon, until 1950, when Colville appeared on the scene and offered to purchase the note. Even though the note was long past due, it does not appear that they even bothered to write again to Hugh Weldon, who had obtained the note for Barbee. This

negligence in failing to take any action is not excused. The most casual inquiry, either in San Francisco or Los Angeles, would have revealed the death of Edward Cebrian. From that point, just as Colville found, the trial was blazed to the San Francisco probate proceedings. The heirs at law were here in substantial numbers. Their counsel has at all times maintained the same office address and telephone number as appears on the Los Angeles petition.

Such negligence, unexplained, prohibits plaintiff from claiming the benefits of the exception to Section 338(4), Code of Civil Procedure of California.

Hobart v. Hobart Est. Co., 26 Cal. (2d) 412 at 437, 159 P. (2d) 958;

Latta v. Western Investment Co., 173 Fed. (2d) 99 (Ninth Circuit).

Having constructive or presumptive knowledge of the filing of both 1945 probate petitions, they had the equivalent of actual knowledge of the very actions they say constitute a fraud.

There have been a number of California cases in which the pendency of probate proceedings have given such constructive notice of the contents thereof that the statutory bar of Section 338(4) C.C.P. was set in motion, even without actual knowledge of the alleged fraud. These cases are :

Coates v. Smith (1949), 95 Cal. App. 2d 20, 212 P. 2d 62;

Bankers Trust Co. v. Patton (1934), 1 Cal. 2d 172, 33 P. 2d 1019;

Gibson v. Rath, 13 Cal. App. 2d 40, 55 P. 2d 1219;

Crabbe v. White, 113 Cal. App. 2d 356, 248 P. 2d 193.

We submit that appellant's pleading and proof are each insufficient to enable her to escape the bar of the Statute of Limitations, Section 338(4), Code of Civil Procedure, under the rules laid down in the California cases cited.

It follows that by reason of the failure to sustain a cause of action based upon the alleged fraud, the failure to file a claim in the probate proceeding is unexcused and bars any subsequent action on the note.

IV.

PREJUDICIAL LACHES APPEARS FROM THE COMPLAINT AND EVIDENCE AND BARS PLAINTIFF'S CLAIM.

Appellant here seeks equitable relief in so far as she seeks to excuse the failure to file a claim in probate through proof of an alleged fraud committed by defendant in 1945.

The evidence shows clearly a long delay after plaintiff's predecessor had actual knowledge of the facts she now sets forth as showing the alleged fraud of defendant.

We pass, for the purpose of argument, the failure to show: (i) any fraudulent representation to appellant or any predecessor in 1945—much less, (ii) any reliance on any such representation, act, omis-

sion or conduct of appellee, and also without any showing of, (iii) injury or damage to appellant or any of her predecessors. We have always understood these requirements were so well established as to be "Hornbook" law. Any allegations in the complaint relative thereto stand as bare conclusions, unsupported by evidence, inference or presumption.

Regarding the defense of laches, however, these are some of the events which have occurred during the twenty-two years since the note in suit matured:

(1) John S. Barbee died.

(2) Edward Cebrian died.

(3) Baylor Van Meter died.

(4) Charles J. Colville died. Mr. Colville alone would have been able to tell us when he first learned of the Los Angeles probate petition.

(5) Josephine McCormick died.

(6) St. John McCormick died.

(7) Correspondence and other papers which passed between Edward Cebrian and Isabelle C. Koch have been destroyed through the years and particularly when she moved her residence in April, 1952, before this action was commenced. (Edwin Koch testimony.)

(8) Edward Cebrian's personal papers and records, if any, pertaining to the note sued on have been lost or destroyed.

The prejudice resulting to defendant from these long delays and the deaths of the principal parties

involved, coupled with the destruction of records, seems too obvious for argument.

V.

APPELLANT'S FAILURE TO ESTABLISH TITLE TO PROMISSORY NOTE IN SUIT.

Appellant has failed to plead a chain of title from John Barbee, the original payee of the promissory note, to herself. By amendment to her complaint made during the trial, appellant now pleads that a Kentucky *corporation,* Van Meter Terrell Feed Co., acquired the note from Barbee. (Complaint, paragraph 3, R. 4 and R. 34.) Appellant claims title from the personal representatives of one Baylor Van Meter. There is not one shred of proof to show that there was ever a transfer of the note from Van Meter Terrell Feed Co. to Baylor Van Meter, nor that he was the sole owner of the corporation.

The issue as to appellant's title to the note was put squarely in issue by the appellee's answer. (Answer, paragraphs 3, 4 and 5, R. 10, paragraph V.)

When an issue of fact as to an assignment of a note is squarely presented, the California Supreme Court held recently that proof of the assignment must be clear. There is no room for speculation.

> *Cockerell v. Title Insurance and Trust Co.,* 42 Cal. 2d 284 at 291-293 (February, 1954), 267 Pac. 2d 16.

Counsel may seek to distinguish this case on the ground that the endorsement there involved was

restrictive, while the note in suit purports to have been endorsed in blank by Barbee, the original payee. The answer, of course, to this contention is that plaintiff has rebutted her own presumption by pleading and introducing proof which indicates the title to the note reposed in the Kentucky corporation from 1932, at least until 1938. (See letter dated April 6, 1938 from Wilson and Harbison, Esqs., of Lexington, and Hugh Weldon, Esq., of Santa Barbara, in 1938, entitled, Re: Van Meter Terrell Feed Co. vs. Edward Cebrian. Defendant's Exhibit "A".)

Having pled intervening ownerships of the note, appellant must complete the chain and prove the transfer of title from the corporation to her predecessor, Baylor Van Meter. Mere production of the note long after maturity does not meet the burden in the face of a denial of plaintiff's title and plaintiff's own attempt to plead and prove the intervening transfers.

In the *Cockerell* case the Court said at page 292 of 42 Cal. 2d, 267 Pac. 2d 16 at 21:

> "The burden of proving an assignment falls upon the party asserting rights thereunder. (*Read v. Buffum,* supra, 79 Cal. 77 (21 P. 555, 12 Am.St.Rep. 131); *Ford v. Bushard,* 116 Cal. 273 (48 P. 119); *Bovard v. Dickenson,* 131 Cal. 162 (63 P. 162); *Nakagawa v. Okamoto,* 164 Cal. 718 (130 P. 707).) In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue (*Quan Wye v. Chin Lin Hee,* 123 Cal. 185 (55 P. 783)) but

the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee. (*Gustafson v. Stockton etc. R.R. Co.*, 132 Cal. 619 (64 P. 995).)"

VI.

PLACE OF CONTRACTING WAS KENTUCKY.

The evidence indicates the note of Edward Cebrian was signed in California, and mailed to Hugh Weldon in Santa Barbara. (Plaintiff's Exhibit No. 2.)

This note was given in payment of a note made in 1928 by Edward Cebrian in favor of John Barbee. (Plaintiff's Exhibit No. 3.)

But we have indisputable evidence that the new note was not and could not be delivered unless or until certain conditions had been met. These conditions were: (1) The endorsement of the new note by the payee, John S. Barbee, to *his* creditor Van Meter Terrell Feed Co., the Kentucky corporation; and (2) the confirmation of the amount and "acceptability" by Barbee and the corporation. (Plaintiff's Exhibit No. 3.)

Obviously, since both Barbee and the corporation were in Lexington, Kentucky, the new note had to be sent to Kentucky before all these conditions could be met. And until they could be met, by the express declarations of the creditor, the new note was not to be deemed an effective instrument completed by de-

livery. The conditions were met some time just prior to December 3, 1932. (Plaintiff's Exhibit No. 4.)

While the creditor might have permitted Hugh Weldon, as the payee's agent, to accept delivery of the note in his California office, unfettered with further conditions, the fact is this was not done and as we have seen, the failure to meet any one of the conditions to be performed in Kentucky would have rendered the new note a nullity. The fact that Edward Cebrian may not have known of these conditions, or the fact that his note had to be sent to Kentucky before delivery could be completed, does not alter the fact of non-delivery. His knowledge or intent could not perfect delivery in the face of his creditor's cautious refusal to accept it until the payee had endorsed it in Kentucky.

The place of contracting is the place in which the final act was done which made the promise, or promises, comprising the contract binding.

Vol. 11, *Cal. Juris.,* Second, page 44, Sec. 6.

Thus here the final acts necessary to make the note in suit effective and binding on Edward Cebrian were the verification of the amount and the endorsement of the note by Barbee.

Vol. 11, *Cal. Juris.,* Second, page 145, Sec. 61;
Dow v. Gould and Curry, S. M. Co. (1867), 31 Cal. 629 at 652.

While it is clear that under California law it is the place of *performance* which is controlling as to all questions involving the validity and construction of a

contract (Part II), even under the so-called "historic" rule Kentucky law must be applied because the note in suit actually became effective in Kentucky, i.e. the contract was made there.

In conclusion to the argument in support of appellee's special defenses presented in this appendix to her reply brief, we respectfully submit:

I. This action to recover upon a promissory note was barred by the four year California Statute of Limitations on May 15, 1937, seven years before the maker, Edward Cebrian, died. (Part I. Section 337(1) Code of Civil Procedure.)

There is no waiver of the statute of limitations contained in the promissory note here in suit, to prevent the operation of the California four year statute. (Part I.)

II. This action would be barred by the California "borrowing" statute of limitations (Section 361, Code of Civil Procedure) in the event the language of the promissory note can be construed to contain a permanent waiver of the statute of limitations. (Part. II.)

The promissory note was payable in the State of Kentucky and must therefore be construed and its validity determined by the laws of Kentucky. (Part II.)

III. This action is barred by the provisions of Section 338(4), Code of Civil Procedure, and neither appellant's complaint, nor her proof are sufficient to

bring her within the exception to that statute. (Part III.)

IV. Prejudicial laches on the part of appellant and her predecessors bar her cause of action. (Part IV.)

V. Appellant failed to establish title to the promissory note, and rebutted any presumption of ownership by attempting to prove a chain of title which is incomplete, especially in the face of a specific issue as to title raised by the answer. (Part V.)

VI. The promissory note was not only payable in Kentucky, it was delivered in that state, i.e. the contract was made there. Thus, it follows that even under the "historic" or "splitting up" rule (which is not the law in California, Part II), the validity of the note and its interpretation must be determined by the laws of the State of Kentucky.

Regardless, therefore, of the view this Court of Appeals may take of the conclusions reached by the trial judge on the fraud issue, we respectfully submit the special defenses urged by appellee support the judgment in her favor.

Dated, San Francisco, California,
January 3, 1956.

CHARLES D. SOOY,
Attorney for Appellee.

No. 14747

United States
Court of Appeals
for the Ninth Circuit

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, Appellant,

vs.

NOVA GARETT WALSH, individually and as administratrix of the estate of Ralph H. Garett, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —6-29-55

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 7

Appeal:
- Certificate of Clerk to Transcript of Record on 26
- Notice of 24
- Statement of Points on (USCA)..... 166
- Supersedeas and Cost Bond on..... 24

Certificate of Clerk to Transcript of Record.. 26

Complaint 3

Findings of Fact and Conclusions of Law..... 12

Judgment 22

Letter dated Dec. 31, 1954, Judge Driver Announcing Decision (Copy)..... 11

Names and Addresses of Attorneys..... 1

Notice of Appeal 24

Reply 10

Statement of Points on Appeal (USCA)..... 166

Supersedeas and Cost Bond on Appeal..... 24

Transcript of Proceedings and Testimony.... 27

Exhibits:

1—(Plaintiff's)—Policy of Insurance ERD 35766 (Portion) 34

2—(Defendant's)—Statement of Nova V. Garett dated Oct. 14, 1953..... 59

3—(Plaintiff's)—Certificate of Death 97

Witnesses:

Garett, Ralph

—direct 70

—cross 79

—redirect..... 85, 87, 88

—recross..... 86, 88, 89

Lowell, Dr. Roy S. (Deposition)

—direct 126

—cross 129

—redirect 137

—recross 139

McKinlay, Dr. D. Wilson

—direct 90, 106

—cross 111

—rebuttal, direct 140

—cross 144

Noah, Lizzie

—direct 121

—cross 124

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Walsh, Nova Garett
—direct 31
—cross 49
—redirect 67
—recross 69
—rebuttal, direct 147
—cross 155
—redirect 158

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Spokane, Washington,

Attorneys for Defendant-Appellant. [1*]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the Superior Court of the State of Washington,
in and for the County of Stevens

NOVA GARETT WALSH, individually and as administratrix of the estate of Ralph H. Garett, deceased, Plaintiff,

vs.

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

That the plaintiff herein was on September 25, 1953, and for some years prior thereto the wife of Ralph H. Garett. That the said Ralph H. Garett died at Spokane, Washington, on September 25, 1953 and that plaintiff is his widow and is the duly appointed, qualified and acting administratrix of the estate of the said Ralph H. Garett, deceased, having been appointed such administratrix by the Superior Court of Stevens County, Washington under date of October 2, 1953. That plaintiff has now remarried and is the wife of Jack Walsh and resides at Colville, Stevens County, Washington.

II.

That the above named defendant, Commercial Travelers Insurance Company, at all times herein mentioned, was and now is a corporation organized and existing under the laws of the State of Utah

and that the said defendant at all times herein mentioned has been engaged in the insurance business in the State of Washington. That under date of April 26, 1948, the above mentioned Ralph H. Garett, who was then the husband of plaintiff made and entered into a contract if insurance with the defendant, a corporation, herein being policy No. ERD - 35766 dated April 26, 1948, wherein and whereby upon the payment of an annual premium of $130.50 commencing on May 1, 1949 the said Ralph H. Garett was insured at all times thereafter while said insurance policy remained in force and effect for the full payment of the sum of $3750.00 in the event of the loss of life of the said Ralph H. Garett directly and exclusively of all other causes from bodily injury sustained through external violent and accidental means.

III.

That the said Ralph H. Garett paid the annual premiums due under the said policy and contract of insurance and that the said policy of insurance containing the provision above referred to was in full force and effect on September 25, 1953.

IV.

That on or about September 24, 1953 the said Ralph H. Garett, while engaged in his usual occupation as a farmer, was unloading a load of wheat upon his farm. That while so engaged in unloading wheat at the time and place aforesaid the said

Ralph H. Garett suffered a severe strain caused by heavy lifting and over exertion and as a direct result thereof suffered a coronary occlusion of his heart as a direct result of which accident and occurrence the said Ralph H. Garett died on the following day. [5]

V.

That the direct and proximate cause of the death of the said Ralph H. Garett was due to accidental means in that the said Ralph H. Garett while engaged in unloading heavy sacks of wheat upon his farm on September 24, 1953 suffered a severe strain by reason of heavy lifting which exerted him to such an extent that his heart suffered undue strain which caused a coronary occlusion as a direct result therefrom and that such coronary occlusion was caused by no other means than the sudden strain due to the lifting by the said Ralph H. Garett of heavy sacks of wheat weighing approximately 140 pounds each, which was the sole and only cause of his suffering said coronary occlusion which resulted directly in his death on the following day, namely September 25, 1953.

VI.

That the injury sustained by the said Ralph H. Garett while engaged in lifting heavy sacks of wheat at his farm at the time and place above set forth amounted to an accident as contemplated and defined by the express terms of the policy of insurance then in effect with the defendant herein in that the said Ralph H. Garett died as a direct and casual result of external violent and accidental

means sustained while engaged in his usual occupation and while the said policy and contract of insurance was in full force and effect.

VII.

That the said policy of insurance provides that upon such accidental death the said Ralph H. Garett or his estate is entitled to receive a cash payment in the sum of $3750.00 and that the plaintiff herein, as surviving spouse and as administratrix of the estate of said Ralph H. Garett, deceased, is entitled to receive such payment as agreed upon in said contract and policy of insurance.

VIII.

That upon the death of the said Ralph H. Garett the plaintiff herein promptly notified the defendant of the fact of such death and forthwith and in accordance with the terms of said policy filed proof of claim for the sum of $3750.00 due to the plaintiff herein under the said contract and policy of insurance by reason of the accidental death of the said Ralph H. Garett as above set forth. That the said defendant has wrongfully, unlawfully and in direct violation of the terms of said policy of insurance failed and refused to pay to the plaintiff herein the said sum of $3750.00 or any part or portion thereof and has absolutely refused to make any payment or settlement whatsoever with the plaintiff and that there is now due and owing to the plaintiff herein by reason of the foregoing the sum of $3750.00.

Wherefore plaintiff prays that upon a hearing hereof she be awarded judgment against the above named defendant in the sum of $3750.00 together with interest thereon at the rate of 6% per annum from September 25, 1953 until paid, together with all costs and disbursements by plaintiff herein expended.

RAFTIS & RAFTIS,
Attorneys for Plaintiff

Duly Verified. [6]

[Endorsed]: Filed District Court June 8, 1954.

In the District Court of the United States, Eastern District of Washington, Northern Division

No. 1185

NOVA GARETT WALSH, individually and as administratrix of the estate of Ralph H. Garett, Deceased, Plaintiff,

vs.

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, Defendant.

ANSWER

Comes now the defendant and for answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations of paragraph One of the complaint.

II.

Admits the allegations of paragraph Two of the complaint, except the last two lines thereof, and alleges that the wording of the policy in question was to insure against loss of life of said Ralph H. Garett "resulting directly and exclusively of all other causes from bodily injury sustained during the life of this policy solely through external, violent and accidental means * * *"

III.

Admits the allegations of paragraph Three of the complaint.

IV.

Admits the allegation in the first sentence of paragraph Four; and denies the allegations of the second sentence of paragraph Four, except defendant admits that said Ralph H. Garett died on September 25, 1953.

V.

Denies the allegations of paragraph Five of the complaint.

VI.

Denies the allegations of paragraph Six of the complaint. [10]

VII.

Denies the allegations of paragraph Seven, except defendant admits that said policy of insurance names Ralph H. Garett or his estate as beneficiary.

VIII.

Admits the allegations contained in the first sentence of said paragraph Eight of the complaint, except defendant denies that the proof submitted established any claim under said policy; and denies the allegation contained in the second sentence of said paragraph Eight, except defendant admits that it has refused and does refuse to make any payment to plaintiff under said policy.

Further answering said complaint and as an affirmative defense defendant alleges that the death of Ralph H. Garett did not result directly and exclusively of all other causes from bodily injury sustained during the life of said policy solely through external, violent and accidental means, but on the contrary was the result of a pre-existing heart condition or disease.

Wherefore having fully answered plaintiff's complaint, defendant prays that same may be dismissed and that defendant may have judgment for its costs and disbursements to be taxed herein.

/s/ HAMBLEN, GILBERT & BROOKE
/s/ H. M. HAMBLEN,
Attorneys for Defendant

Acknowledgment of Service attached. [11]

[Endorsed]: Filed September 15, 1954.

[Title of District Court and Cause.]

REPLY

Comes now the above named plaintiff and by way of reply to the answer of the defendant herein admits, denies and alleges as follows:

I.

Replying to paragraph II of said answer, the plaintiff admits the same, except as otherwise alleged in her complaint herein.

By way of reply to the further answer and affirmative defense, the plaintiff denies each and every matter, allegation and thing therein, except as otherwise admitted in the complaint herein.

Wherefore, having fully replied to the answer and affirmative defense of the defendant herein, the plaintiff moves that the same be dismissed and that plaintiff be awarded judgment and relief as prayed for in her complaint.

/s/ RAFTIS & RAFTIS,
Attorneys for Plaintiff

Duly Verified.

Acknowledgment of Service attached. [12]

[Endorsed]: Filed October 6, 1954.

Chambers of Sam M. Driver, U. S. District Judge
Spokane 6, Washington

(Clerk's Copy)

P.O. Box 465, Pasco, Wash. Dec. 31, 1954

Raftis & Raftis
Dorman Bldg., Colville, Wash.
Hamblen, Gilbert & Brooke
Paulsen Bldg., Spokane 1, Wash.

Re: Walsh vs. Commercial Travelers Inc. Co. No. 1185.

It is my conclusion in the above case that the insured, Ralph H. Garett died as the result of an accident brought about by the unusual, unexpected and unforeseen happening related in the testimony of Ralph Garett, Jr. The Findings of Fact should follow his testimony and as to the cause of death the testimony of Doctor McKinley. The applicable law is set forth in the Washington cases cited in Plaintiff's Memorandum Brief.

If you can agree upon the form of the Findings of Fact, Conclusions of Law and Judgment make the usual endorsements of your approval and mail *the to* the Clerk. Otherwise I suggest that Plaintiff's counsel prepare and serve a proposed set and mail them to me and within ten days thereafter Defendant's counsel serve and mail to me any counter proposals he may care to make. I shall then if possible settle and sign them without personal appearance of counsel. You will of course have ten days under the Civil Rules to submit proposed amendments.

I shall be in Spokane for three or four weeks beginning January 10th.

Yours truly,

U. S. District Judge [181]

[Stamped]: Received Jan. 3, 1955. Clerk U. S. District Court, Spokane, Wash.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on for trial in the above entitled court on the 21st day of October, 1954, Honorable Sam M. Driver, Judge, presiding, the plaintiff appearing in person, and by John T. Raftis, representing the firm of Raftis & Raftis, attorneys, appearing for and on behalf of the plaintiff, and H. M. Hamblen of the firm of Hamblen, Gilbert & Brooke, attorneys, appearing for and on behalf of the defendant, and the plaintiff and defendant having introduced evidence on behalf of plaintiff and defendant herein, and the court having heard and considered the same, and having heard the argument of counsel, and briefs having been submitted herein on behalf of plaintiff and defendant, and the court having read and considered the same, and being fully advised and satisfied in the premises, hereby makes its findings of fact and announces its conclusions of law:

Findings of Fact

I.

That Nova Garett Walsh, plaintiff herein, was on September 25, 1953, and for some years prior thereto, the wife of Ralph H. Garett. That the said Ralph H. Garett died at Spokane, Washington, on September 25, 1953, and that the plaintiff herein is his widow and is the duly appointed, qualified and acting administratrix of the estate of the said Ralph H. Garett, deceased, having been [182] appointed such administratrix by the Superior Court of Stevens County, Washington, under date of October 2, 1953. That plaintiff has now remarried and is the wife of Jack Walsh and resides at Colville, Stevens County, Washington.

II.

That the above named defendant, Commercial Travelers Insurance Company, at all times herein mentioned, was and now is a corporation organized and existing under the laws of the State of Utah and that the said defendant at all times herein mentioned has been engaged in the insurance business in the State of Washington.

That under date of April 26, 1948, the above mentioned Ralph H. Garett, who was then the husband of plaintiff, made and entered into a contract of insurance with the defendant herein, being policy No. ERD-35766, dated April 26, 1948, wherein and whereby, upon the payment of an annual premium of $130.50, commencing on May, 1949, the said Ralph H. Garett was insured at all times there-

after, while said insurance policy remained in force and effect, for the full payment to his estate of the sum of $3750.00, in the event of the loss of life of said Ralph H. Garett, "resulting directly and exclusively of all other causes, from bodily injury sustained solely through external, violent and accidental means."

III.

That the said Ralph H. Garett paid the annual premiums due under the said policy and contract of insurance, and that the said policy of insurance containing the provision above referred to was in full force and effect on September 24, 1953, and on September 25, 1953.

IV.

That on September 24, 1953, the said Ralph H. Garett had procured a load of seed fall wheat at Colville, Washington, consisting of about 43 sacks weighing approximately 140 pounds each. That the said seed wheat was loaded on a 2-ton flat bed Chevrolet truck having side grain racks about three feet high from the wood floor on said truck. [183]

V.

That the said Ralph H. Garett transported said truck loaded with seed wheat above described to his farm home near Colville, Washington, and had backed said truck near the door of a cabin in which grain was stored, the door of said cabin being approximately three or four feet from the end of said truck, and the end of the flat bed of said truck was

overlapping the front porch extending out from said cabin with the loading surface of said truck bed some 18 inches to two feet above the surface of the porch floor. That the said wheat was to be unloaded from the truck into said granary by sliding the same down along and upon a plank 2″x8″ and about 9′ in length, which plank ran from the flat bed at the end of said truck and across and over the front porch of the cabin to the floor of the building in which the grain was to be loaded.

VI.

That the said wheat sacks were unloaded in the following manner; that the said Ralph H. Garett took hold of said sacks and slid them one at a time along the floor of said Chevrolet truck to the end of said truck and there placed them upright at the end of said plank above described. Thereafter the said sacks were taken by Ralph Garett, son of the above named Ralph H. Garett, who slid said wheat sacks in an upright position along said plank into the granary or building where they were to be stored. That the said Ralph Garett on September, 1953, was fourteen and one-half (14½) years of age, weighed about 125 pounds and was about 5′ 6″ in height.

VII.

That the said Ralph H. Garett had moved about nine sacks of said wheat along the bottom of said truck and stood them upright at the end of the plank, to be taken to said building by his said son, Ralph Garett. That Ralph H. Garett then delivered

another sack of seed wheat weighing about 140 pounds to the end of the truck and stood the same upright and his son, Ralph Garett, took hold of said sack and had started to slide it down the plank described above, when the said sack of wheat got out of control of the said Ralph Garett and started to fall [184] over in an opposite direction from said plank. That Ralph H. Garett, now deceased, was standing a few feet from said sack of wheat last described, and, when he observed that his son was unable to hold said sack of wheat upright on said plank, the said Ralph H. Garett took one step forward, reached out and quickly or suddenly jerked or grabbed said sack of wheat with one hand, and with the other hand held onto the building into which the wheat was being loaded, and remained in this posture, holding the sack of wheat at about a 45 degree angle, until the said Ralph Garett went around said truck to the opposite side of said plank and assisted his father, the said Ralph H. Garett, in straightening up said sack of wheat. That the said Ralph Garett thereupon proceeded to take said sack of seed wheat into the building. That, if said Ralph H. Garett has not reached out and held said sack of wheat, it would have merely fallen 18″ to 2 feet to the porch floor of said building, from whence it could have been moved into the storage room. That, immediately upon returning to the truck, the said Ralph Garett observed that his father, the said Ralph H. Garett, was in a stooped position upon the truck holding his chest, and he observed that his father was in pain. That the said

Ralph H. Garett was unable to unload any more wheat and went into the dwelling. That thereafter the said Ralph H. Garett continued to be in pain and distress and was pale and was unable to eat his evening meal.

VIII.

That, approximately 25 minutes after the incident above described had occurred, the said Ralph H. Garett left with his wife, the plaintiff herein, for Spokane, Washington. That the said Ralph H. Garett had previously arranged to go to Spokane, Washington, for the purpose of having an x-ray taken to determine a possible stomach condition of which the said Ralph H. Garett had complained. That on the way to Spokane, Washington, the said Ralph H. Garett continued to be in distress and pain and, before reaching his destination at Spokane, he became very distressed and ill, and that it was necessary to summon a doctor to attend the said Ralph H. Garett. [185]

IX.

That Dr. D. Wilson McKinlay of Spokane, Washington, responded to a call for a doctor and made an immediate examination of said Ralph H. Garett and determined that he was suffering from an acute heart ailment. That the said Ralph H. Garett was thereafter removed to a hospital in Spokane and died on September 25, 1953.

X.

That an autopsy performed upon the body of the said Ralph H. Garett disclosed that he had been

suffering from an advanced condition of arteriosclerosis of the coronary arteries, with marked narrowing of the lumens of two of the arteries of his heart, and a complete closure of one of said arteries, with some scar tissue of the muscle area supplied by such artery, indicating an old scar, showing it had closed sometime in the past, preceding the present injury. Said autopsy further disclosed a marked narrowing of the anterior circumflex descending artery, with a fresh thrombus or blood clot plugging such artery, and with the muscle supplied by that particular artery hemorrhagic, and already undergoing necrosis, showing a very recent coronary attack, said autopsy verifying the prior diagnosis made by said attending physician when called to treat the said Ralph H. Garett.

XI.

That the coronary arteries of the said Ralph H. Garett had narrowed to about one-third (⅓) of their normal size, but that the amount of blood going through such coronary to supply the cardiac muscle would be a limited amount sufficient to do ordinary exertion, and that the said Ralph H. Garett was able to move said sacks along the bed of said truck while he was doing so at a steady pace, and he suffered no pain therefrom. That, when the said sack of seed wheat had gotten beyond the control of Ralph Garett, his son, as above described, and the said Ralph H. Garett quickly or suddenly jerked or grabbed said falling sack, and leaned over from the end of said truck, supporting his own

weight by leaning over from the [186] end of said truck to the building near by, and partially supporting the weight of the sack of wheat with the other hand, such situation constituted additional exertion so as to build up an unusual amount of need for blood in the heart, and, by reason thereof, the heart was unable to sustain such additional exertion, and that the additional exertion, as above described, was the direct and proximate cause of an acute or sudden coronary attack being suffered by the said Ralph H. Garett, which thereafter resulted in his death from a thrombus or blood clot, which acted as a plug to stop up all blood going through the artery to his heart. That such a closure or stoppage of the artery of said Ralph H. Garett resulted in sudden pain, evidenced almost immediately thereafter, and that the resulting blood clot was sufficient to stop the flow of blood through said artery to the heart. The court finds that the additional exertion experienced by the said Ralph H. Garett, as above described, was sufficient to produce the thrombus or blood clot which thereafter produced the death of the said Ralph H. Garett.

XII.

That upon the death of the said Ralph H. Garett, the plaintiff herein promptly notified the defendant of the fact of such death, and, forthwith, and in accordance with the terms of the said policy, filed proof of claim for the sum of $3750.00 due to the plaintiff herein under the said contract and policy of insurance, by reason of the death of the said

Ralph H. Garett, as above set forth, but defendant failed and refused to pay said plaintiff said sum, or any part or portion thereof.

Conclusions of Law

From the foregoing facts, the court concludes as follows:

I.

That the falling of said sack of wheat from the plank on which it was being unloaded by the said Ralph Garett, son of Ralph H. Garett, now deceased, followed by the taking hold of said falling sack of wheat by said Ralph H. Garett, in the manner above described, was an unusual, unexpected and unforeseen event, and [187] the court finds that the same constituted an accident.

II.

That the acute or sudden coronary attack suffered and sustained by the said Ralph H. Garett, as hereinabove described, amounted to an accident as contemplated and defined by the express terms of the policy of insurance, which was in full force and effect between the said Ralph H. Garett and the defendant herein at the time that the said Ralph H. Garett suffered said accident and thereafter died therefrom, and that the death of the said Ralph H. Garett resulted directly and exclusively of all other causes, from bodily injury sustained solely through external, violent and accidental means, while he was engaged in his usual occupation, and while the said contract and policy of insurance was in full force and effect, as aforesaid.

III.

That plaintiff as surviving spouse and as administratrix of the estate of said Ralph H. Garett, deceased, is entitled to receive the full payment of $3750.00 as provided by the express terms of said contract on policy of insurance which has been received in evidence herein, and that said sum is now due and owing to the plaintiff herein, and said plaintiff is entitled to be awarded judgment against the above named defendant in said principal sum of $3750.00, together with interest thereon at the rate of 6 per cent from September 25, 1953, until paid, and together with costs and disbursements as provided by law to be taxed by the Clerk of the Court herein.

Dated this 15th day of March, 1955.

/s/ SAM M. DRIVER,
Judge

Presented by:
/s/ John T. Raftis of Raftis & Raftis,
Attorneys for Plaintiff

Approved as to form only:
/s/ H. M. Hamblen of Hamblen, Gilbert & Brooke, Attorneys for Defendant [188]

[Endorsed]: Filed March 15, 1955.

In the District Court of the United States, Eastern District of Washington, Northern Division

No. 1185

NOVA GARETT WALSH, individually and as administratrix of the estate of Ralph H. Garett, deceased, Plaintiff,

vs.

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, Defendant.

JUDGMENT

The above entitled cause, coming on regularly for trial on the 21st day of October, 1954, Honorable Sam M. Driver, Judge, presiding, plaintiff appearing in person and by John T. Raftis, of Raftis & Raftis, attorneys, and the defendant appearing through H. M. Hamblen, of the firm of Hamblen, Gilbert & Brooke, attorneys, and witnesses having been sworn, and evidence having been adduced by the plaintiff and defendant herein, and the court having heard and considered the same, and having heard the argument of counsel, and written briefs having been submitted on behalf of plaintiff and defendant herein, and the court having read and considered the same, and the court having heretofore made its findings of fact and announced its conclusions of law, and being fully advised and satisfied in the premises:

Now, Therefore, it is hereby Ordered, Adjudged and Decreed as follows:

I.

That the plaintiff, Nova Garett Walsh, individually and as administratrix of the estate of Ralph H. Garett, deceased, have and she is hereby awarded judgment against the above named defendant in the principal sum of $3750.00, together with interest thereon at the rate of 6% per annum from September 25, 1953 until paid. [189]

II.

That the said plaintiff is hereby awarded all costs and disbursements expended herein by the said plaintiff, the same to be taxed by the Clerk of the above entitled Court.

Dated this 15th day of March, 1955.

/s/ SAM M. DRIVER,
Judge

Submitted by:

Raftis & Raftis, signed by John T. Raftis of Raftis & Raftis, Attorneys for Plaintiff.

Approved as to form:

Hamblen, Gilbert & Brooke, signed by H. M. Hamblen, Attorneys for Defendant. [190]

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Commercial Travelers Insurance Company, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on March 15, 1955.

Dated at Spokane, Washington, this 5th day of April, 1955.

HAMBLEN, GILBERT & BROOKE
/s/ H. M. HAMBLEN,
Attorneys for Defendant

Acknowledgment of Service attached. [191]
[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

Comes now the undersigned, Commercial Travelers Insurance Company, a corporation, defendant above named, and does hereby acknowledge that it is firmly bound unto the plaintiff, above named, in the sum of $5,000.00, and does deposit with the Clerk of the above entitled court as surety and security therefor one United States Treasury Bond, No. 301-A, payable to Bearer, in the face amount of $5,000.00, with coupons No. 25 to No. 53 inclusive attached.

The condition of this bond is that, whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit from the judgment of this court, entered March 15, 1955, if this defendant shall pay the amount of the final judgment herein if its appeal shall be dismissed or the judgment affirmed or modified together with all costs that may be awarded, then this obligation to be void and the security deposited herewith returned to defendant, otherwise to remain in full force and effect and with full authority granted to sell and apply the security deposited herewith to the satisfaction of said judgment and costs.

COMMERCIAL TRAVELERS INSURANCE COMPANY,
/s/ By HAMBLEN, GILBERT & BROOKE, Its Attorneys,
Defendant-Appellant

Form of bond and sufficiency of Surety approved April 12, 1955.

/s/ SAM M. DRIVER
Judge [192]

Received $5,000.00 United States Treasury Bond No. 301A, with Coupons Nos. 25-53 attached, April 11, 1955.

STANLEY D. TAYLOR, Clerk
/s/ By EVA M. HARDIN, Deputy [193]

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals on file in the above entitled cause:

Petition for Removal and Complaint.

Notice of Removal.

Bond on Removal.

Answer.

Reply.

Court Reporter's Record of Proceedings at Trial.

Exhibits: Plaintiff's 1, Policy ERD 35766; Defendant's 2, Statement of Nova V. Garett; Plaintiff's 3, Certificate of Death.

Copy of Letter of Judge Driver announcing decision.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Supersedeas and Cost Bond on Appeal.

Appellant's Designation of Record on Appeal.

Statement of Points on which Appellant intends to rely on Appeal and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by Appellant's Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 26th day of April, A.D. 1955.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, United States District Court, Eastern District of Washington.

In the District Court of the United States, Eastern District of Washington, Northern Division

Civil No. 1185

NOVA GARETT WALSH, individually and as administratrix of the Estate of Ralph H. Garett, deceased, Plaintiff,

vs.

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Thursday, the 21st day of October, 1954, before the Honorable Sam M. Driver, Judge of the said Court, without a jury; the plaintiff being represented by John T. Raftis, appearing for Raftis & Raftis, her attorneys; the defendant being represented by H. M. Hamblen, appearing for Hamblen, Gilbert & Brooke, its attorneys;

Whereupon, the following proceedings were had, to-wit: [14*]

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* Page numbers appearing at foot of page of original Reporter's Transcript of Proceedings.

Spokane, Wash., Oct. 21, 1954, 10 o'clock a.m.

The Court: All right, proceed, gentlemen, when you are ready.

Mr. Raftis: May it please your Honor, the case of Nova Walsh, suing individually and as administratrix of her husband's estate, against Commercial Travelers Insurance Company, a corporation.

Has your Honor had an opportunity to read the file?

The Court: Yes, I read them yesterday so that I am familiar with the pleadings.

Mr. Raftis: Would it be helpful if I made a brief statement?

The Court: No, you may make a statement, anyway.

Mr. Raftis: I will state briefly what the position of plaintiff is and the evidence to support the position.

We will show that Ralph H. Garett, who resided near Colville, Washington, was engaged in farming and had taken out through the Commercial Travelers Insurance Company of Salt Lake City, Utah, an accident policy, which we will introduce into evidence, which shows that if death results from bodily injury sustained through external, violent and accidental means, such accident being exclusive [15] of other causes and resulting solely through these means that I have just mentioned, that the company will, in that event, pay an accidental death benefit amounting to $3,750.

We have alleged that on the 20th day of September, 1953, while Ralph H. Garett was at his farm

home, was unloading a load of seed wheat, and we will describe how that was being done—it also appears that Ralph H. Garett had had some illness prior thereto, which will be brought up in connection with the accident itself—while engaged in unloading the wheat, he was assisted by his minor son, Ralph H., Jr., and they had unloaded about nine sacks. The father would slide them along the base of the bed of the truck and the son would then take them and slide the sacks down a board into the granary which was a few feet away from the truck.

About the ninth or tenth sack, the father took the sack over to the end of the truck on the board, and his son, in attempting to get hold of the sack, lost his balance and the father lunged forward and grabbed the sack to prevent its falling to the ground and held it there for an interval until the son could get down out of the granary and go around and assist in taking the sack from his father and getting it to the granary.

We will show that immediately after this unforeseen occurrence, the father suffered a severe pain in his [16] chest, which later developed to be—I believe they call it a coronary occlusion—as a result of which he was unable to proceed with any further work and his wife and his mother were obliged to proceed with the unloading of the wheat, which consisted, I think, of around 40 sacks altogether originally.

The Court: Was there a postmortem examination?

Mr. Raftis: Yes, yes.

The Court: It showed the formation of a thrombus or blood clot in the coronary artery?

Mr. Raftis: Well, we will have the doctor here who performed that.

The Court: There is no dispute as to whether he had a prior heart condition?

Mr. Raftis: He did have.

The Court: He did have.

Mr. Raftis: Although we will show he was not aware of that condition fully.

The Court: Oh.

Mr. Raftis: He thought it was a stomach disorder, either peptic ulcer or possible cancer, and that he was to go into Spokane that day, or early the next morning, to see a Dr. Galloway to have an x-ray of his stomach, and that he did start in that night after this pain developed.

When he got to Spokane, as a result of this [17] injury we have described, he was unable to get any relief, and they called a Dr. McKinlay, who came to the hotel and took him in charge, and he died the following morning and the postmortem showed this occlusion which the doctor will describe.

That, briefly, is our evidence, and our position being, of course, that the occurrence was something unforeseen and unusual and, therefore, would come within the definition of "accident," as opposed to some voluntary act. Your Honor is familiar with that rule.

The Court: Do you wish to reserve your statement?

Mr. Hamblen: No statement at this time, your

Honor. Probably, we will have a statement later.

The Court: It struck me in reading the pleadings that the primary issue here would be a question of law, aside from some differences, perhaps, as to how this happened and as to the prior condition, and I don't know as to that. But the primary issue, I should think, would be whether or not this type of result would be within the coverage of the policy.

Mr. Hamblen: I think that is correct, your Honor.

Mr. Raftis: In other words, whether it is an accident.

The Court: Yes, whether it is an accident within the meaning of the policy. [18]

Mr. Raftis: That's right.

The Court: As that term is defined in the langauge of the policy.

Mr. Raftis: That's right.

The Court: All right, you may proceed, then.

NOVA GARETT WALSH

called and sworn as a witness on her own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. Raftis): Your name is Nova Garett Walsh?

A. That is right.

Q. And, Mrs. Walsh, who was Ralph H. Garett?

A. Ralph H. Garett was my former husband.

Q. And when did he die?

(Testimony of Nova Garett Walsh.)

A. He died September 25, 1953.

Q. And subsequent to his death, I will ask you whether or not you have remarried and your present name is Walsh? A. That is right.

Q. And, Mrs. Walsh, what was your husband's occupation?

A. He was a farmer, a rancher, at the time he took out this policy and more or less continued ranching until his death.

Q. How old was Ralph H. Garret? A. 42.

The Court: He was 42 at the time of his death?

A. 42 or 43. Let me see.

The Court: Well, that is all right.

A. 42, I believe, is right.

Q. (By Mr. Raftis): How large a man was he with regard to weight?

A. He weighed about 123 pounds.

Q. And I will ask you state whether or not you had any children, you and Ralph H. Garett?

A. We have one son, Ralph, Jr.

Q. And what is his age? A. He is 15.

Q. What would be his age at the time that your husband died? A. 14.

The Court: As I recall, the appointment of Mrs. Walsh as administratrix and in her representative capacity is admitted in the pleadings?

Mr. Raftis: Yes. I was going to ask her, but counsel has admitted that.

The Court: That is admitted, as I recall.

Mr. Hamblen: Yes, your Honor. We didn't check it, but I am sure she was appointed.

(Testimony of Nova Garett Walsh.)

The Court: Yes, all right. [20]

The Clerk: I have marked Plaintiff's Exhibit 1 for identification, your Honor, this policy.

Q. (By Mr. Raftis): Mrs. Walsh, I will ask you, for the record, if you were appointed as administratrix of the estate of Ralph H. Garett, deceased? A. That is right, I am.

Q. Are you acting in that capacity at this time?

A. Yes.

Q. And were you in that capacity at the time you commenced this action?

A. I am quite sure I was, sure I started it right away.

Q. You were appointed very shortly after your husband died? A. Yes, in a week, I believe.

Q. Mrs. Walsh, handing you Plaintiff's Exhibit 1 for identification, will you examine the document and state what it is?

A. This is a policy my husband took out. I took one just like it. I was insured until after his death and I dropped mine, also.

Mr. Hamblen: Object to the voluntary statement and ask it be stricken from the record as immaterial.

The Court: Yes, it is not material here.

Mr. Raftis: Yes, that may be stricken. In other words, just respond to the question.

A. That is it. [21]

Q. This is the policy that Ralph H. Garett had with the Commercial Travelers Insurance Company? A. That is right.

(Testimony of Nova Garett Walsh.)

Q. And was that policy in effect on September 25, 1953, at the time your husband died?

A. It was, we have always kept it up.

Mr. Hamblen: No objection.

The Court: It will be admitted, then. There isn't any question, as I understand it, about the policy itself being in effect?

Mr. Raftis: That's right.

(Whereupon, the said policy of insurance was admitted in evidence as Plaintiff's Exhibit No. 1.)

PLAINTIFF'S EXHIBIT No. 1

This Policy Provides Benefits for Loss of Life, Limb, Sight or Time by Accidental Means, and for Loss of Time by Sickness or Disease, as Herein Provided

Expansion Refund Disability Policy
Commercial Travelers Insurance Company
Salt Lake City, Utah

$150.00 Monthly Disability Benefits; $3,750 Accidental Death Benefit; $7,500 Travel Death Benefit.

Does Hereby Insure Ralph H. Garett of Colville, Washington, herein referred to as the Insured, a Farmer by occupation, subject to all the conditions and limitations hereinafter contained and endorsed hereon or attached hereto.

Against: (1) The effect resulting directly and exclusively of all other causes, from bodily injury sus-

tained during the life of this policy solely through external, violent and accidental means (suicide, sane or insane, not included), said bodily injury so sustained being hereinafter referred to as "such injury" and

(2) Disability resulting from sickness or disease which is contracted and begins during the life of this policy and after it had been maintained in force for thirty days from its date, hereinafter referred to as "such sickness."

Schedule of Benefits

Part A

1. Monthly Accident Benefit One Hundred Fifty Dollars.
2. Monthly Sickness Benefit One Hundred Fifty Dollars.
3. Monthly Hospital Benefit Two Hundred Twenty Five Dollars.
4. Monthly Nurse Benefit Two Hundred Twenty Five Dollars.
5. Principal Sum Thirty Seven Hundred Fifty Dollars.
6. Accidental Death Benefit Thirty Seven Hundred Fifty Dollars.
7. Travel Accident Death Benefit Seventy Five Hundred Dollars.

Part B

1. Special Ten Year Cash Bonus

For any term of ten (10) consecutive years that this policy is maintained in continuous force and no claim has been paid or loss incurred, the Com-

pany will pay to the Insured a Cash Bonus of Six Hundred Dollars.

This policy is issued in consideration of the statements in the application of this policy, a copy of which is made a part of this contract, and the payment of the first Annual premium of One Hundred Thirty and 50/100 Dollars, from 12:00 o'clock noon standard time at the place where the insured resides on the day this contract is countersigned, until 12:00 o'clock noon, such standard time of the first day of May, 1949.

2. Annual Profit-Sharing Dividend

Premiums after the first year shall be reduced by dividends based upon the earnings and savings of the company, but in no event shall the dividends be less than $30.00.

Since a minimum dividend is guaranteed under this policy, renewal premium deposits after the first year shall never be more than those listed on the front panel.

In Witness Whereof: The Commercial Travelers Insurance Company, has caused this policy to be signed by its President, its Secretary and Countersigned by a person duly authorized for the purpose.

/s/ A. W. CONOVER,
President
/s/ R. S. SATTERFIELD,
Secretary

Countersigned at Salt Lake City, Utah, the 26th day of April, 1948.

Non-Assessable

This policy is guaranteed renewable during any period the insured is qualifying for the special ten year cash bonus. Renewal of the policy after lapse or payment of a claim shall be at the option of the Company.

Form ERD

* * * * *

Q. Mrs. Walsh, I will inquire briefly as to the history of the physical health of Ralph H. Garett prior to his death September 25, 1953. I will ask you when, if at all, did you learn and know prior to his death that he had indications of a heart condition? A. Prior to his death?

Q. Prior to his death, yes?

A. Prior to his death, we went in about, I think, somewhere around September 5th—— [22]

Q. What year?

A. Of '53, the year he died.

Q. Pardon me.

A. All I can tell you, they run a cardiogram of him and showed some markings in it and showed it to me, but it did not mean anything to me, I didn't know anything about cardiograms.

Q. In other words, prior to that time, had there been any suggestion at all——

A. Never, never before.

Q. And that was in 1953 you are referring to?

A. Right.

Q. Which would be two or three weeks prior to his death somewhere, three weeks?

(Testimony of Nova Garett Walsh.)

A. Died the 25th, it would be about three weeks.

Q. About three weeks, yes. And prior to that time, what had been his general complaint or ailment for which he had been treated?

A. Stomach trouble, and he had had a couple of operations before that.

Q. When were these operations?

A. I think about the 9th month—let's see—about the second month, the 9th day of '48—he had a double hernia operation, which we thought had caused his sickness, and he had had that repaired and he was fine for [23] a year or so. And then he had his appendix removed in about December of '48 and he seemed to be better then for awhile. And then after we went out to this other ranch, we bought this ranch, he developed an allergy, and he had an allergy from about March, when he was working in the wheat, seeding, until his death, and the doctor said it was allergy, they call it wheat allergy. And that is what we were treating him for all the summer months, and he was supposed to keep out of the dust and out of the dirt because of this allergy. Therefore, we had my uncle there and my uncle did most of the work because of the wheat allergy.

Q. And as I understand it, you didn't know all of this time there was any suggestion or indication of a heart situation?

A. Nothing other than the doctor told him he must have rest. I believe he told him he might have a little heart condition, but he must have rest. I

(Testimony of Nova Garett Walsh.)

don't know, I wasn't with him. See, I didn't go with him the last time.

Q. I am asking as to your knowledge?

A. To my knowledge, I knew nothing of it.

Q. I see. Relating to the stomach condition that you described, will you tell anything further, if there is anything further, as to the symptoms of the stomach [24] disorder?

A. His stomach bothered him terrible and he would get up in the night and vomit sometimes, and he couldn't keep his food down at all and he kept thinking he had stomach trouble and he would go in to the doctor, and the doctor thought he had stomach trouble, too. In fact, I saw a record just the day before I come down where they were treating him for peptic ulcer.

Q. My inquiry, of course, is that prior to this date in September, the date the cardiograph was taken, his complaint, as you have now stated, was mostly in regard to his stomach?

A. In regard to his stomach.

Q. Now, after the cardiograph was taken in September, 1953, did you ever go back into Dr. Lowell's office further in regard to your husband's condition?

A. I never entered Dr. Lowell's office after September 5th, or whenever that date was that he run the cardiogram, until after his death. After his death, I went in and I——

Q. I will ask you that further. A. Okay.

Q. But, in other words, you did not go back in?

A. I did not.

(Testimony of Nova Garett Walsh.)

Q. I will ask you if you and your husband came to Colville [25] on or about September 24, 1953?

A. We did.

Q. That, of course, being the date prior to his death that you have just testified to?

A. That is right.

Q. What was your husband's general health at that time?

A. Other than allergy, he seemed to be feeling fine. He was covered with an allergy. And we come to town and I was in your office that day. I had a bill to pay through you, I paid, as I recall, and I didn't go to the doctor with him that day.

Q. What did he do that day when he was in town?

A. He stopped in at Newland's and played cards and he played cards all day. Then I usually went in and picked him up about lunch time, and we stayed at Newland's and ate our lunch, and then after that, why, he played cards some more, and then in the evening about the time for the elevator to close, he went down and they loaded up this wheat for him and we went home, planning to come to Spokane——

Q. Where did he get this load of wheat?

A. At Pat Brushenham's elevator, the only elevator we have.

Q. That is the flour mill and wheat elevator?

A. Flour mill, Colville Flour Mill.

Q. Is that at Colville, Washington? [26]

A. That's right.

(Testimony of Nova Garett Walsh.)

Q. And I believe you said that the employees at the mill loaded the wheat for him?

A. That is right.

Q. What was this wheat for, just by way of inquiry?

A. It was a treated wheat to seed on this 89-acre farm we have. We have an 89 acre wheat allotment. That was enough wheat to cover that.

Q. Yes. Had you bought any other wheat previously during that fall?

A. No, we had sold wheat. We just marketed our wheat and brought back a load.

Q. Had your husband loaded and unloaded wheat prior to that time?

A. He did not, he didn't have to load it or unload it. We hired a combine to combine it and it went right into the truck and was taken right to the elevator and dumped in the elevator, as you know.

Q. So this, then, I take it, was the only load of wheat that he came in contact with as far as loading or unloading? A. That's right.

Q. During the year 1953? A. That is right.

Q. Now, when he drove the wheat out to the farm, I take [27] it—did he drive the truck home?

A. He drove the truck home. He felt fine, sure.

Q. And about what time of the evening did you arrive home from Colville?

A. Well, I imagine it was about 5:30, 6 o'clock. We only live 10 miles out.

Q. While he was in Colville on September 24, 1953, to your knowledge, do you know whether

(Testimony of Nova Garett Walsh.)

arrangements were made that he should go into Spokane?

A. He told me, he said, and he had a piece of paper with the doctor's address on in Spokane, Dr. Galloway he was supposed to see, he said, "Dr. Lowell is sending me to this stomach specialist, Dr. Galloway, and," he said, "I am to have x-rays." And——

Q. Well, now, that is enough. A. Sorry.

Q. For that answer. And had you then, you and he, made plans to go into Spokane in response to that request from the doctor? A. Yes.

Q. When did you expect to go in?

A. Well, that evening as we were going home, I said to him, I said, "Let's just go in tonight." He said, "Oh, well, we better wait until morning." I said, "Why not go tonight? Then you will have a good night's rest before [28] the case, you won't have that drive ahead of you." And he said, "Okay."

Q. Very well. Then when you got home with the load of wheat, did you have any other means of going to Spokane except with your truck?

A. No, we didn't, that is the only automobile we owned.

Q. So was it necessary that the wheat be unloaded that evening? A. Yes, it had to be.

Q. Now, who proceeded to unload the wheat, to your knowledge?

A. Ralph began to unload it until—Ralph unloaded until he took sick and then we had to finish.

Q. Who helped?

(Testimony of Nova Garett Walsh.)

A. Junior helped take it off the truck.

Q. That is your son that you are describing?

A. That's right, Ralph, Jr.

Q. Whom you mentioned awhile ago? A. Yes.

Q. Do you know how they had the truck arranged and how they proceeded to unload this load of wheat? A. Yes, I do.

Q. Just describe that briefly to the Court.

A. I may have to stand to do so.

Q. Well, if you want to illustrate to the Court, you may [29] stand.

A. Okay. We had built a bunch of cabins for some airmen and the airmen had moved out and we thought we would use this granary—or these cabins then for granaries, and they had three little steps up in them to enter it and there was a door, and a truck, as you know, is quite high, I can't jump into them, I imagine they hit me about here (indicating), and he had a plank about so, I would say about a 2 x 8, he had it from the top here down into this door. Then he would slide the grain over and set it on the plank and put it down for the youngster or the youngster would come and help him. I wasn't out there when the youngster unloaded, I don't know how they managed it, but I think that is the way it was done and that is the way I proceeded to do after he took sick.

Q. All right. Where were you at the time he started to unload the load of wheat?

A. Mother and I were in the house trying to prepare some dinner. We was going to prepare a

(Testimony of Nova Garett Walsh.)

lunch right quick to have lunch before we went to Spokane.

Q. You say Mother and you; was that your mother?

A. That is the husband's mother, Mrs.——

Q. That is Ralph H. Garett's mother?

A. That is Ralph H. Garret's mother. [30]

Q. What is her name? A. Mrs. George Noah.

Q. After he started unloading the wheat, what was the first thing that come to your attention after he commenced unloading this load of wheat?

A. Well, I just thought I would take a look out —I don't know what made me do it—just looked out the window and I saw him unloading the wheat and saw him doubled up with pain, just doubled up in a pained position.

Q. Describe it to the Court what you saw. How did he indicate his distress?

A. I just saw him stand up in a stooped position like this (indicating) and more or less leaning against the truck.

Q. And was that after he had started unloading the wheat?

A. That was the first time I saw him. I didn't see him up until then.

Q. What did you do then after you saw that?

A. I said to Mom, I said, "My goodness, Mom——"

Q. Regardless of what you said, just what did you do?

A. I went right out and helped him unload it.

(Testimony of Nova Garett Walsh.)

Q. Did his mother go out with you?

A. And his mother come out and it took two of us to help unload it.

Q. Was he able to unload any more wheat?

A. He didn't unload any more, he couldn't. [31]

Q. And do you know how many sacks of wheat there were on the load? A. There were 43.

Q. 43 sacks. And do you know how much these sacks weighed?

A. They weighed 140 pounds apiece.

The Court: Sewed sacks, weren't they?

A. Sewed sacks.

The Court: What kind of wheat was it, do you know?

A. There was two kinds; one was Almira and the other was—I never did learn what the one was.

The Court: Was it hard or soft wheat?

A. Soft wheat.

Q. (By Mr. Raftis): So then you and his mother yourselves unloaded the balance with his son, I take it? A. That is right.

Q. And did you have occasion then to observe how the wheat was being unloaded?

A. I know how Mother and I did it. We drug it over, she took an ear and I took an ear, and we slid it over and down the plank.

Q. And was that plank, you said, about 8 inches wide, to the best of your knowledge?

A. It was about a 2 x 8.

Q. After you went out and you saw your husband doubled up, what was his condition with ref-

(Testimony of Nova Garett Walsh.)

erence to color, or, in [32] other words, describe to the Court any symptoms you may have observed?

A. Well, he looked kind of peaked. I don't know, he had had this allergy so bad that he had looked bad from the allergy, anyway, wheat allergy, and I don't know if I noticed how his color looked or anything. I just knew he was sick and I knew that I finished the load.

Q. State whether or not he ate his meal after that?

A. He did not. I said to him, I said, "Well, go on in the house and Mom and I will finish this." And he went in the house and sit down and Mom and I come in, then she finished—she helped me, we finished our supper, and he refused to eat. So when he didn't eat, I said, "Well, I won't eat, either." I said, "Maybe we will stop on the way and get a cup of coffee or something." I thought if he felt more like eating, then we would have a cup of coffee on the way, but he never did feel like eating.

Q. How long was it before you started to Spokane to see the doctor?

A. Oh, I imagine immediately. We started right away, I think, probably half an hour after we got the load unloaded.

Q. Did he drive the car starting——

A. I drove part of the way. [33]

Q. And state whether or not, Mrs. Walsh, your husband continued to show symptoms of distress?

A. He was sick all the way. I drove and when we got into Spokane, he said, "Mom, I am so sick."

(Testimony of Nova Garett Walsh.)
And I said, "Well, gee, I hope you are able to drive when we get to Spokane because I'm afraid to drive in the city." He said, "Oh, I don't think it will be too bad."

Well, we got out to the edge of town, I don't know about how far, but, anyway, he took over and he drove a little ways and he said, "I just can't drive any more," and he pulled over on the side of the road. And he said, "Do you mind if I lay my head in your lap?" I said, "No, go ahead, if it helps you any." He was laying his head on me rolling with pain. He was practically all over the front seat. I said, "I'll go over to the station and get you a bottle of soda pop, that might relieve you." He seemed to have gas and he was belching terrible. And so I goes over to this station and I got him a bottle of strawberry soda pop, and I said to this man at the station, I said, "How far is it into Spokane or the Pedicord Hotel?" where we had planned to stay all night. He said, "It is exactly six miles from this station to the city." And I said, "My gosh, I didn't think it was that far."

Q. In other words, it was then about six miles out of town? [34]

A. Six miles. Well, I had to finish driving then that six miles to the Pedicord, and when I got to the Pedicord, I was another about 45 minutes before I could get him able to get out of the car and into the hotel.

Q. Did you call the doctor at that time?

A. When I got in the hotel, I asked——

(Testimony of Nova Garett Walsh.)

Q. Just, in other words, you shouldn't repeat what others told you, Mrs. Walsh, just say what you did. A. I see. Yes, I called the doctor.

Q. And who did you call?

A. We called Dr. McKinlay. He was the only doctor on night duty.

Q. A doctor here in town?

The Court: McKinlay?

A. Dr. McKinlay.

Mr. Raftis: McKinlay, your Honor.

The Court: All right.

Q. (By Mr. Raftis): And what did Dr. McKinlay do with reference to treating your husband further?

A. He just sort of examined his stomach and told him he could do better examining him and everything if he could take him to the hospital. And we told him we were down there for stomach x-rays, and he said, "Well, you are too sick a man for x-rays now." He said, "The only thing we can do is take you to the hospital." [35]

Q. Did he take him to a hospital?

A. He took us to the hospital. We got in his car and went to the St. Lukes Hospital.

Q. And——

A. That was about midnight, I guess, or 11 o'clock, something like that.

Q. Did your husband continue to have this distress and pain continually?

A. It continued until he passed away the next morning, I think about 11 o'clock.

(Testimony of Nova Garett Walsh.)

The Court: What time did you say he passed away the next morning, approximately?

A. It seems like it was about a quarter to 11 or a quarter after, I'm not too sure.

The Court: Well, just the approximate time.

A. Uh-huh, it was around 11.

Mr. Raftis: I believe that is all. You may examine.

Cross Examination

Q. (By Mr. Hamblen): Mrs. Walsh——

A. Yes, sir?

Q. How long had you and Mr. Garett been in the farming business? [36]

A. Practically all our life, except from the time we sold in the Basin and bought an apartment place, and we stayed there about a year, I guess, or such a matter, and my husband said he wanted to go back to the farm, so we traded that business for this farm.

Q. So all of your married life——

A. Practically, except he worked on the civil defense, you know, on the war, but he was a——

Q. Did wheat farming off and on during that time?

A. During the time of what, his defense work?

Q. During the period of your marriage with him?

A. We were farming practically all of our married life.

Q. That included wheat farming mainly, did it not?

(Testimony of Nova Garett Walsh.)

A. Well, wheat and—in Nebraska, we raised lots of corn. We farmed in Nebraska several years.

Q. When were you married to Mr. Garett?

A. I was married to Mr. Garett on March the 1st, 1930.

Q. 1930. So that over a period of——

A. 20 some years.

Q. ——20 odd years, he engaged in farming, a large part of which was wheat farming, here and other places? A. Yes.

Q. And this farm up near Colville was acquired by you and Mr. Garett when?

A. January—oh, well, we acquired it in December. We [37] moved out there, I think, in January of 1953. We hadn't been there but about nine months, eight or nine months, when he died.

The Court: Where was that place?

A. It is out of Arden just three miles; 10 miles from Colville.

Q. (By Mr. Hamblen): Now, as I understand it, Mr. Garett had been to Dr. Lowell in Colville for treatment for various things prior to the summer of '53?

A. I think he doctored with Dr. Lowell since 1948 sometime.

Q. Since 1948?

A. Since Dr. Lowell's coming there. We was probably one of his first customers.

Q. And along toward the end of August of 1953, he went to Dr. Lowell again on account of pains in his stomach or chest, isn't that right?

(Testimony of Nova Garett Walsh.)

A. Right.

The Court: I didn't get that doctor's name.

Mr. Raftis: Lowell.

The Court: Lowell?

Mr. Raftis: Yes.

Q. (By Mr. Hamblen): Dr. Roy S. Lowell, I believe, was it not? A. That's right.

Q. And again early in September, 1953, he went back to see [38] Dr. Lowell?

A. I don't think—I don't know if he went in August. He went, I think, the first part of September.

Q. Around September 5th, would that be?

A. Well, I should have checked that date when I was up there, but I didn't. I imagine it is about right.

Q. About that date, uh-huh. And Mr. Garett, after that visit to Dr. Lowell, came back home and advised you that Dr. Lowell had diagnosed a heart condition?

A. He said, "I had a slight heart condition, I must slow down."

Q. And Mr. Garett told you that the doctor advised him to quit all farm work?

A. I don't recall that. I was with Ralph when he went to Dr. Lowell on September 5th, he didn't have to tell me anything, I was with him that day.

Q. Oh, you were with him?

A. On this September 5th when he run the cardiogram, I was with him. I know exactly what he told him that day.

(Testimony of Nova Garett Walsh.)

Q. You think it was the first visit in September when you say you were with him?

A. When he run the cardiogram on him, I was with him, but I wasn't with him on the last visit.

Q. The last visit was on September 24th?

A. That's right. [39]

Q. Well, in any event then, if you were with him, you, yourself, heard Dr. Lowell admonish him not to engage——

A. He told him he better take it easy and he said, "Go to bed for a couple of weeks." That is what he told him and he did, he went to bed a couple of weeks.

Q. Well, didn't he advise him to quit all farm work and sell the farm?

A. He told him to sell the farm, but it takes time to sell a farm.

Q. Well, didn't he advise him to quit any farm work, particularly anything that required strenuous exercise or heavy exercise?

A. You know, for the last—since '48 he had told him not to lift or exert, and that was after he repaired him for a double hernia and we figured it was because of the hernia. Nothing was ever mentioned of heart trouble.

Q. Well, again on September 5th, or whatever the date was early in September, he did repeat that advice to him, didn't he?

A. As I stated to you, he told him to go to bed for two weeks, take a rest, and he did such.

(Testimony of Nova Garett Walsh.)

Q. Didn't say anything to him about not doing heavy work from this time on?

A. Ralph had been advised not to do heavy work for a long time. [40]

Q. For a long time?

A. To use machinery to lift it.

Q. Since 1948, he had been advised not to do heavy lifting?

A. Right, because of his hernia. He said, "Man you are so full of stitches, I don't want to ever see you back here again for a hernia operation." He didn't want him to rupture again. That is exactly what he told him. He repaired one side and Dr. Canning the other.

Q. Well, in any event, following this visit to Dr. Lowell early in September, you knew that Mr. Garett had a heart condition?

A. I thought I knew a lot of things, but I'm no physician.

Q. Well, I understand that, Mrs. Walsh, but you knew from what Dr. Lowell told you?

A. Dr. Lowell told him a heart condition, yes, and he showed me a cardiogram with some little marks in, but it didn't mean too much to me, I don't don't know much about cardiograms.

Q. Now, on September 24th, you and Mr. Garett, with your Chevrolet flat-bed truck, went to the elevator and picked up some 20 or 25 sacks of seed wheat? A. It happened to be 43.

Q. 43? A. 43. [41]

Q. Oh. And the wheat was loaded at the ele-

(Testimony of Nova Garett Walsh.)

vator around 5 or 6 in the evening of the 24th of September?

A. That's right, we always made the elevator just before closing time. When we went to town, we didn't hurry back.

Q. And from there, you drove on back to your farm? A. That's right.

The Court: That was the elevator in Colville, I assume, wasn't it?

A. Uh-huh, that's right.

The Court: All right, go ahead.

Q. (By Mr. Hamblen): And on arrival at the farm, you went into the house to get dinner and Mr. Garett called the boy out of the house to help him unload the wheat; is that right?

A. That's right.

Q. How far is your house from this place where the wheat was being unloaded?

A. As I stated, this wheat, where we unloaded, was in some apartments we had built for three airmen's families to live in and it was just right across from my back door, I would say about 30, 35 feet.

Q. You could look right out of the kitchen door and the kitchen window?

A. Looked out of my dining room door right across and look [42] at it. We built them close to our house so they could have access to our bathroom and such.

Q. And did you see Mr. Garett back the truck up to this porch or platform of the little cabin or whatever it was?

(Testimony of Nova Garett Walsh.)

A. I did, I was with him when he backed it up. When we came home, we backed it up to the place and I got out and went into the house.

Q. Was that a wooden porch on that cabin?

A. It was a wooden porch, yes.

Q. Did he back the flat bed right up over the porch?

A. No, he couldn't, right up over it, because there was three little steps out there, three little, tiny steps. I would say they was just about that wide a porch (indicating). The kids built them. They didn't plan to stay long, we just built a short porch. There was three little steps just so high up to their door, and he backed this up there and they slid them in.

Q. And did you see them put the plank up in the end of the flat bed to the porch?

A. No, I didn't.

Q. You went on into the kitchen?

A. I went on into the kitchen.

Q. You didn't watch what he was doing then until you happened to look out later on? [43]

A. That's right.

Q. And you saw him at that time standing on the flat bed and bending over?

A. And doubled up with pain.

Q. Or was he sitting down?

A. Well, he was more or less—he was in a stooped position and I believe more or less leaning against the bed. You could call it sitting or standing, either one.

(Testimony of Nova Garett Walsh.)

Q. But he was up on the floor of the bed?

A. He was still on the flat bed, yes.

Q. And that is all you saw of him in the unloading process up to that time?

A. That is all I saw of him when unloading the wheat.

Q. You didn't see him moving the sacks?

A. I did not.

Q. You didn't see the son moving the sacks?

A. I did not.

Q. When you saw him in that position when you immediately went out to see what the trouble was—— A. That is right.

Q. And you asked him what the trouble was, didn't you? A. I did.

Q. And he told you that he thought maybe he had strained himself, didn't he?

A. He said, "I just can't do any more," that's what he said. [44] He had hurt himself. I said, "Well, you go on in and Mom and I—" I always called her "Mom"—I said, "Mom and I will unload."

Q. He said, "It's just too heavy for me?"

A. That's right, he said, "It's just too heavy, I can't do it."

Q. He didn't say he had slipped or stumbled or fallen or anything of that kind?

A. He did not tell me.

Q. And you asked him?

A. I recall later—I mean, I couldn't recall it until later—that when we were unloading another sack, Mom and I had one slip and we had quite a

(Testimony of Nova Garett Walsh.)

time juggling it back, and he said, "I had one do that with me and I had a heck of a time getting it back," but that is all I remember him saying. I do remember now that he said that.

Q. But, in any event, you did ask him what happened and all he said was it was too heavy for him, he couldn't do it?

A. "Just can't do it any more."

Q. Did he stay there on the truck then, sit there, while you finished unloading?

A. No, he stayed a little bit, I imagine we unloaded three or four sacks before he got down. I said, "Why don't you get down and go in the house?" I said, "Mother and [45] I can finish this." She came out right away. And that is what he did. When we went in, he was sitting in a chair.

Q. You then later in the evening, as soon as you could get away, drove on into Spokane, as you have testified? A. That's right.

Q. And where was it that he tried to do the driving? About six miles out of the city?

A. No, a little more than six miles, because I imagine he drove a couple of miles, a couple or three miles. We pulled over and he took the wheel. And he said, "I just can't drive in," and I said, "Well, pull over to the side and maybe you will feel a little better in just a little bit." Well, he pulled over to the side and he just never did get better. As I said, I went to the station, I got a bottle of soda pop and gave him.

(Testimony of Nova Garett Walsh.)

Q. Did the driving that he tried to do seem to make him worse?

A. Well, he was in so much pain, he couldn't drive, that is the fact. He just couldn't.

Q. It was just too much of a strain on him to drive?

A. He was doubled up in pain, he couldn't drive.

Q. Well, he did drive, you said, for two miles?

A. He drove for two miles, yes, or approximately, maybe three. [46]

Q. Then he said, "I can't do it?"

A. He said, "I can't do it."

Q. And he just was doubled up on the seat and you took over again? A. That's right.

The Clerk: Defendant's 2 for identification.

Q. (By Mr. Hamblen): Mrs. Walsh, showing you what has been marked for identification as Defendant's No. 2, is that your signature?

A. Definitely.

Q. You recognize it as such?

A. Sure, I do.

Q. And would you look at that exhibit and see if that is a statement which you made and signed on the date of October 14, '53?

A. Right.

Q. Is that a statement you made at that time?

A. This man and I sit down and had a talk, as the insurance men do, and that is exactly, that is the same as I have just told you.

Q. That is exactly what you told him and——

A. Well, as near as I can gather.

(Testimony of Nova Garett Walsh.)

Q. And you made the statement——

A. They come out so soon, you hardly have time to adjust yourself, you don't know what you are telling for sure. [47]

Q. Well, there isn't anything incorrect in this statement, is there?

A. I don't notice anything. As I read it over, I didn't see anything in there.

Mr. Hamblen: Offer 2 in evidence.

Mr. Raftis: I understand she gave this to an insurance adjustor?

Mr. Hamblen: That is what she said, yes.

A. Uh-huh.

Mr. Raftis: No objection.

The Court: It will be admitted. You have offered it, haven't you?

Mr. Hamblen: I have offered 2 in evidence.

The Court: It will be admitted.

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 2.)

DEFENDANT'S EXHIBIT No. 2

Oct. 14, 1953

Statement by Mrs. Ralph H. Garett, Rt. 3, Colville, Wn., regarding health history of Ralph H. Garett, deceased 9-25-53.

My late husband, had been bothered with upper abdominal pain, which felt like stomach trouble, for over three years. He had been under Dr. Lowell, & this doctor had advised him to quit farm-

(Testimony of Nova Garett Walsh.)

ing in 1951. He sold out & bought a motel & this February, 1953, & he started feeling better. We purchased this farm in February & he had performed the work up till 9-24-53. About mid August he started having chest pains & the first part September he went to Dr. Lowell. Dr. Lowell told him at that time that he had a heart condition & should quit work & rest. He continued light chores & continued to have chest pains. On 9-24-53 he had done some heavy lifting & had severe chest pains. We went immediately to Spokane & on the way he had two more attacks & was hospitalized the same night. I have read this statement fully, understand it, & it is true.

/s/ NOVA V. GARETT

Witness: Signed G. W. Clayton.

Q. (By Mr. Hamblen): Well, Mrs. Walsh, you recall my taking your deposition prior to the trial of this case sometime back? A. Right.

Q. And you gave your sworn testimony about this occurrence at that time? A. Right. [48]

Mr. Hamblen: May I have the deposition of Mrs. Walsh published?

The Court: Yes, it may be opened.

Mr. Hamblen: Want to look over my shoulder?

Mr. Raftis: No, but there were a couple of corrections that had to be made.

The Court: You haven't a copy of it?

Mr. Hamblen: I have a copy of it.

(Testimony of Nova Garett Walsh.)

Mr. Raftis: The reporter didn't have time to make some corrections in it, he said, this morning.

Mr. Hamblen: If your Honor please, there were two or three little typographical corrections that Mr. Stewart wanted made, and they don't affect any of the part that I am going to ask the witness about.

Mr. Raftis: No objection to the deposition, except there were just some minor matters of names and I think——

Mr. Hamblen: The boy's name was entered as George, instead of Ralph, Jr. That is one mistake.

Mr. Raftis: Another referred to the weight of the wheat sacks, I think. The reporter had put it down 155 and the testimony was 135. I think the other one was he used the word "we," instead of "he."

Mr. Hamblen: Yes, we can agree on those corrections.

Mr. Raftis: They are not very important, except they ought to be called to the Court's attention. [49]

The Court: Well, the Court has personal, if not judicial, knowledge that 155 would be very heavy for wheat, because that would be a big sack of Turkey Red or something to weigh that much.

All right, go ahead.

Q. (By Mr. Hamblen): Mrs. Walsh, do you recall my asking you these questions and your giving these answers:

"Q. When you went out after you looked out the window and saw something was wrong, did you talk to him and ask him what was the matter?"

(Testimony of Nova Garett Walsh.)

Your answer is:

"A. I did, and he said, 'I've got a pain in my chest.' That is what he said, a severe pain in his chest. 'Right here,' he said, 'right there.' "

"Q. Did he say, 'I strained myself,' or anything like that, 'I can't go on unloading?' "

"A. He said, 'I can't unload it, it is too heavy.' I said, 'Well, why didn't you call me in the first place?' And he said, 'Well, Mom, it just kills me to have to call you to do lifting.' "

"Q. He wasn't doing anything more than he [50] should have, was he?"

"A. Just lifting more than he could lift, I guess."

"Q. I mean, it was a common practice, wasn't it, to unload wheat that way?"

"A. Men unload wheat that way, I suppose."

"Q. Well, he had done it before, hadn't he?"

"A. Well, he hadn't had any to unload, of course. You see, we combined and put it in the truck and then the elevator dumped it, and then when the elevator lifted it, he had to unload it."

"Q. Did he know how to handle wheat sacks? He wasn't clumsy, was he, or awkward?"

"A. No."

"Q. He didn't tell you he had slipped or fallen, anything of that kind, did he?"

"A. No, he didn't tell me anything like that."

"Q. And as far as you know——"

"A. It was just a strain from lifting, I am sure."

"Q. Just a strain lifting?"

(Testimony of Nova Garett Walsh.)

"A. Just a strain from lifting." [51]

"Q. There wasn't anything said by him about anything else, that he had stumbled or anything of that kind?"

And Mr. Raftis interposed: "For the record, I will object to that, that is immaterial."

Do you——

The Court: It will be overruled.

Mr. Hamblen: (Continuing reading:)

"A. I don't recall it."

"Q. (By Mr. Hamblen): At least, he never mentioned any such thing to you, did he?"

"A. No."

"Q. And as far as you know, he was just lifting these sacks in the regular way and sliding them down the plank, just as any farmer would do?"

"A. Just lifting them up and sliding them down, that is right."

Do you recall those questions and answers?

A. Sure, I do.

Q. And those are correct, are they?

A. I see nothing wrong with them, other than I don't believe he was lifting them too much. I don't know how he did it. I know he had to slide them down the plank to get them into the room. He had to take them from the [52] front end of the truck to the back somehow, however he did it.

Q. Well, do you say today now that he told you that there was something else in connection with this than the regular procedure? You mentioned in

(Testimony of Nova Garett Walsh.)

your testimony that one of the sacks was supposed to have slipped.

A. That is what we say today, yes.

Q. That is what you say today?

A. That that testimony came from my son, who actually helped him unload it.

Q. Well, then, he didn't tell you anything about that himself? When I say "he," I mean Mr. Garett.

A. He did tell me about it. I told you he said, "One slipped from me and I had a heck of a time getting it back."

Q. I am speaking of the time of your deposition, you were asked——

A. At the time of the deposition, I didn't recall it.

Q. You didn't recall it at that time?

A. I didn't recall it at that time.

Q. Do you recall these questions and answers in your deposition:

"Q. (By Mr. Hamblen): Notwithstanding this admonition from Dr. Lowell about working, doing heavy work, he did proceed, as you [53] have already testified, to attempt to unload those wheat sacks?"

"A. He attempted to unload the wheat there, sure."

"Q. And he did that voluntarily and deliberately on his own, did he not?"

"A. Why, sure, nobody forced him to do that. He went out to unload the wheat, yes, sir."

Do you recall those questions and answers?

(Testimony of Nova Garett Walsh.)

A. I do.

Q. And are they correct today?

A. When the man was sent to Spokane to take x-rays, somebody had to unload the wheat. It isn't likely a man would ask his wife to do it, if he was possibly able himself.

Mr. Hamblen: I think that is all.

Mr. Raftis: That is all, Mrs. Walsh.

The Court: When you get the wheat sacks at the elevator, they are these sewed sacks of wheat?

A. That's right, they are sewed.

The Court: The top has two ears, one on each side?

A. Mr. Brushenham charged me a dollar and forty cents—I mean, charged me for 140 pounds in these sacks. I bought the same this year from Hoddy, 135 pounds, so [54] there may be a variation of five pounds, I don't know.

The Court: When you transported them, this was a flat-bottomed truck without any sides on it, as I understand it?

A. There was a rack on it.

The Court: Oh, there was?

A. They call them a flat-bed truck.

The Court: A flat bed, but it had racks on the side?

A. Yes. I think when you buy a license, I believe you pay for a flat-bed truck. It is a 2-ton truck.

The Court: But it has removable sides that make a rack if you put them on?

(Testimony of Nova Garett Walsh.)

A. Yes, you can take them off.

The Court: How were the wheat sacks, were they standing up on end or down flat on the bed of the truck? A. They were laying down.

The Court: Laying down? A. Uh-huh.

The Court: And how many would you have crossways?

A. Well, some of them were. I think maybe some of them were standing up and some were lying down. And some of them were lying down, I know, because Mom and I each had to take hold of an ear and pull them up and drag them over to the back end of the truck. [55]

The Court: Ordinarily, unloading wheat sacks from the back of a truck, what you do is to catch the sack by the ears and pull it, you will slide it along the bottom and then lay it on the plank and there isn't any actual straight-up lifting of the sacks in the operation.

A. There would be, of course, on this little plank. You have to lift it up to get over the plank where the plank stuck over the bed.

The Court: You have the plank setting up in the end of the truck and then——

A. We had the plank sitting up over the edge about that high, like this, (indicating) and you would have to lift it a little bit.

The Court: You would have to either lift it or—— A. Lift it or upend it.

The Court: Upend it, lay it down across the plank? A. Yes.

(Testimony of Nova Garett Walsh.)

The Court: Men usually do as little lifting as possible with those 140-pound sacks, usually slide them and roll them.

A. They should, if they don't. Mother and I certainly did.

The Court: I see. Any other questions?

Q. (By Mr. Hamblen): There wasn't any tail gate up on this flat bed, was there?

A. No, no tail gate. [56]

Mr. Raftis: May I ask one further question?

The Court: I think one point you made is that the end of the plank that stuck over into the truck would be sticking up. It was sticking up above the bottom several inches, probably?

A. That's right.

The Court: All right.

Redirect Examination

Q. (By Mr. Raftis): Did you personally observe that? A. Yes.

Q. The plank sticking up?

A. Definitely. I put about 30 more sacks down the plank, I should have.

Q. Yes. So you are talking now of what you knew directly? A. That's right.

Q. I want to go back a minute to the stomach disorders. I believe you have testified that there were symptoms or a feeling that he had a peptic ulcer?

A. Yes, I saw that on Dr. Lowell's record.

Q. I wanted to ask you another question. Was

(Testimony of Nova Garett Walsh.)

they any other suspected ailment of the stomach that he thought he had besides ulcer?

A. Definitely. I wish I had the money back for all the [57] bottles of angell they fed him.

Q. What for?

A. For stomach trouble. That is to coat the stomach ulcers. He took plenty of ulcer treatment.

Q. Well, the point I am trying to bring out, without asking you directly about it, was there any other possible condition of his stomach besides ulcer that you were concerned about or he was concerned——

A. Well, vomiting and gas, he was so full of gas most of the time, thought it was due to his stomach, and he couldn't eat. Many times I have prepared a meal for him and he couldn't eat it. He just refused to eat, he was so sick.

Q. Did the doctor ever suggest in your presence, refreshing your recollection, that he might possibly have a cancer condition?

A. No, the doctor don't tell you you have a cancer. Even if they suspicion it, they wouldn't tell you. But he did tell him he was definitely sure he had peptic ulcer.

Q. I see. Well, the doctor didn't tell him that, in other words, about cancer?

A. No. No, I think that was probably in Ralph's own mind.

Q. Yes. Well, that is what I was trying to bring out.

(Testimony of Nova Garett Walsh.)

A. He was so sure he had stomach trouble, seemed quite sure that he did. [58]

Mr. Raftis: That is all.

The Court: Any other questions?

Mr. Hamblen: I have one more, as long as Mrs. Walsh participated in unloading these wheat sacks.

Recross Examination

Q. (By Mr. Hamblen): They were quite heavy, had to be moved by deliberate, intentional action on the part of the party who was unloading them, didn't they? A. That's right.

Q. They didn't slide off by themselves?

A. No.

Q. They didn't unload themselves, did they?

A. No.

Q. A person, to unload them, had to intentionally either move them along or pick them up or roll them over onto the plank, isn't that right?

A. That's right, and they had to be put in the shed.

Q. As a voluntary, deliberate act?

A. Well, I don't know about that; I know you just don't move a sack of grain or anything without lifting it somewhat.

The Court: Any other questions?

Mr. Hamblen: No, that is all. [59]

Mr. Raftis: No more questions.

The Court: Court will recess for ten minutes.

(Whereupon, a short recess was taken.)

RALPH GARETT

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Raftis): Ralph, now will you keep your voice up so his Honor can hear what you say, because the Court has to hear your testimony?

Will you give your name, please?

A. Ralph Garett.

Q. And what relationship are you to Ralph H. Garett, deceased? A. He was my dad.

Q. And Nova Garett Walsh, what is your relationship to her? A. My mother.

Q. What is your age, Ralph? A. 15.

Q. And when is your birthday?

A. February 1st.

Q. You were 15 last February 1st. On September 24, 1953, then what was your age? [60]

A. 14.

Q. And are you attending school at Colville, Washington? A. That's right.

Q. What is your weight? A. Now?

Q. Yes, at the present time? A. About 130.

Q. And can you recall about what you weighed on September 24, 1953? A. About 125.

Q. How tall are you? A. Five, six.

Q. Five feet, six inches. Where were you living on September 24, 1953? A. Out on the ranch.

Q. Were you the only child in the family?

A. That's right.

Q. And what was your father's business?

(Testimony of Ralph Garett.)

A. Farming.

Q. Had he been engaged in running the farm there for some time prior to September 24, 1953?

A. Yes, I guess so.

Q. Did he do the usual farm work around the place there? A. Yes.

Q. And did you assist him from time to time?

A. Yes.

Q. Now, on September 24, 1953, do you remember your father bringing to the farm home a load of wheat? A. Yes.

Q. What type of wheat was that, as you recall? That is, was it seed wheat? A. Yes.

Q. And how was it loaded up? Was it in containers or sacks? A. Sacks.

Q. And do you have personal knowledge of how many sacks were on the load?

A. About 43 or 44, I guess.

Q. Could you tell his Honor how those sacks were loaded on the truck, on the load; that is, were they standing up, were they flat, or just how were they put in the truck?

A. They was both, they was all ways.

Q. All ways, they were put in in different manners? A. Yes.

Q. Will you describe briefly the type of truck that the wheat was loaded on, Ralph?

A. Well, it was a Chev. 2-ton.

Q. 2-ton Chevrolet? A. Uh-huh.

Q. And what type of bed did the truck have?

A. Flat.

(Testimony of Ralph Garett.)

Q. Flat bed. What do you mean by a flat bed?

A. Well, flat with side racks.

Q. Did it have a metal surface on the bed?

A. No.

Q. Wood? A. Wood.

Q. Wood surface. And what kind of sides were on the truck? A. Grain sides.

Q. And how high were they from the bed of the truck? A. Oh, about three feet.

Q. And the end of the truck, that is, the back end of the truck, what was the arrangement there?

A. You mean the way we got it off?

Q. Did it have a gate, what they call a board that lifts up and down on hinges?

A. Well, we didn't have anything. When we had the wheat on it, we had it out.

Q. Now, when your father brought this load of wheat on the 24th of September, 1953, were you at home when he arrived there? A. Yes.

Q. And did he request you to help him unload the wheat? A. Yes.

Q. Will you tell the Court, Ralph, just how he backed the [63] truck up about this building so that we may get the picture there of what you were doing?

A. Well, the cabins are setting—there is three right in a row there——

Q. Speak up louder. I think the Judge may not hear what you are saying.

A. There was three cabins there, right beside each other, and pulled up in there by the house and

(Testimony of Ralph Garett.)

backed up right where the back of the truck was fairly close to the door.

Q. How far from the door of this building would the back end of the truck be, as nearly as you recall?

A. Well, about three or four feet.

Q. And, as I take it, you backed the truck up and then were going to take the wheat and slide it into this building? A. That's right.

Q. Is that correct? And what did you use to bridge the space between the end of the truck and the building into which you were going to put this wheat?

A. Well, we had a 2 x 8, it was about 8 feet long.

Q. That is, a plank? A. Yes.

Q. And will you describe how that was set up as to the floor of the building and the bed of the truck?

A. Well, we had the truck backed up there with a plank [64] laying on top of the bed there and then down into the building.

Q. Was there a platform out of this building?

A. Yes.

Q. I think your mother described them as steps there. A. Yes, there is three.

Q. What were they, just 1, 2, 3 up from the ground to the threshold of the door, I take it?

A. Yes.

Q. Was there an open space otherwise between the end of the truck and the building into which you were unloading the wheat? A. Uh-huh.

Q. Now, then, what were your duties, Ralph,

(Testimony of Ralph Garett.)

with reference to assisting in unloading the wheat? What did you do?

A. I took the sacks from the plank down into the building and then set them down in there.

Q. Now, do I understand you, your father would take the sacks from wherever they were on the bed of the truck and bring them to the end of the truck to that plank? A. That's right.

Q. And did your father pick the sacks up and carry them, or how did he do it?

A. He slid them.

Q. Slid them along? [65] A. Yes.

Q. How would he do that? What part of the sack would be grab hold of?

A. Well, two ears, I guess, sticking up there.

Q. When they are sewed, they have ears on them so you could grab hold? A. Yes.

Q. Do you know yourself about how much those sacks weighed?

A. Dad said something they weighed about 140 pounds.

Q. And you have been around a farm enough to know what a sack of wheat is and what it weighs?

A. Yes.

Q. And when he would bring it to the end of the truck then, what would you do to get it into the granary, what you were using for a granary?

A. I would just slide it down that board there.

Q. Was your father unduly exerting himself or was there any unusual exertion in sliding those

(Testimony of Ralph Garett.)

sacks along the base of the truck there, the bed of the truck?

A. He was just sliding them along there, that one started to fall off.

Q. Well, I am leading up to that. But up to the point where something unexpected occurred, was they any difficulty that he was having?

A. Huh-uh. [53]

Q. And how many sacks had he pulled over to the end of the truck before something unusual did occur? A. About nine.

Q. About nine sacks. And will you then describe to the Court, Ralph, what happened about the 9th or 10th sack that he was taking over to you?

A. Well, he got it over there to the board there and I started to take it and it got over-balanced there and started to falling off, and he reached out there and held it, grabbed ahold of it.

Q. Just tell the Court how he had to reach out and grab that sack and hold it.

A. Well, he was just standing there and reached out there real fast and it was about ready to go over.

Q. Well, had it started to fall over? A. Yes.

Q. And were you able to hold it, with your weight and size? A. No.

Q. And what was your father trying to do?

A. Hold it up there while I got around the other side.

Q. Was it necessary that you go around the other side to assist in getting the sack back up?

(Testimony of Ralph Garett.)

A. Yes.

Q. Did your father have to lean over the end of the truck and hold the sack until you could get around there? [67] A. Yes.

Q. Was that sack that he was holding the same weight that these other sacks you have described?

A. Yes.

Q. About 140 pounds, you have said. And up to that point, had your father shown any evidences or signs that he was in pain or distress? A. No.

Q. And what happened after this sack had started to fall and he grabbed it? What happened as far as your father is concerned?

A. He walked over there to the front of the truck there and sort of reached hold of his chest.

Q. Well, just describe to the Court exactly what you saw and what he said, if anything, at that instant.

A. I didn't hear him say anything, but he just did like that (indicating).

Q. That is, he was standing upright or bending over? A. No, he was bent over.

Q. Holding his chest? A. Yes.

Q. What was his color, if you remember, or his expression, anything that might assist the Court to show what his condition actually was?

A. I don't know anything about that. [68]

Q. You don't know. In reaching over for this sack, had the sack gotten out on this plank?

A. Yes.

Q. So that was it necessary for him to reach out

(Testimony of Ralph Garett.)

over the end of the truck? A. Yes.

Q. Did that require him to put himself in an awkward, unusual position? A. Yes.

Q. In what way?

A. Well, he had to sort of stoop over there, and I think his hand was out there holding onto the building with his other hand there hanging onto the sack.

The Court: I didn't understand what you said. One hand was on what? A. The building.

The Court: Oh, the building.

A. Sort of holding, bracing hisself.

Q. (By Mr. Raftis): He was holding that sack with one hand; that was ready to fall, I take it, that sack, if he hadn't held it? A. Yes.

Q. And after you got the sack straightened up, did you then put it in the granary? A. Yes.

Q. And when you came back to the truck, am I correct in stating that is when you noticed he was standing there holding his chest?

A. That's right.

Q. Was your father able to proceed, or did he proceed to unload any more sacks after that happened? A. No, he never.

Q. What did he do?

A. Well, Mom and Grandma come out about that time and helped him, helped me unload it. I kept telling Dad I could get it by myself; he wouldn't let me.

Q. I didn't get that?

(Testimony of Ralph Garett.)

A. I kept telling Dad that I would unload the wheat by myself, but he wouldn't let me.

Q. So your mother and your grandmother came out? A. Yes.

Q. Did they then assist you in unloading the rest of the wheat? A. Uh-huh.

Q. Did your father do anything at all after he had reached over and caught this one sack that was falling? A. No.

Q. Where did he go after that?

A. In the house.

Q. Did you observe him there in the house after you got [70] through with your unloading?

A. I went in and ate.

Q. Did your father eat? A. Huh-uh.

Q. And did your father and mother then shortly thereafter leave for Spokane? A. Yes.

Q. About how long after this occurrence took place did your father and mother leave?

A. Well, about 20 minutes, I guess, 25.

Q. Ralph, would you say that your father was getting along all right, was having no difficulty unloading the wheat, up to this point where this sack got away on you? A. That's right.

Q. Had your father done this type of work before? A. Yes.

Q. Did this distress that he indicated after this sack had gotten away, did that continue until he and your mother had left the home? A. Yes.

Mr. Raftis: I believe that is all, Mr. Hamblen.

(Testimony of Ralph Garett.)

Cross Examination

Q. (By Mr. Hamblen): Ralph, you had helped your father before, too, hadn't you? A. Yes.

Q. This same kind of work?

A. (Witness nods).

Q. Answer so the reporter can hear you.

A. Huh?

Q. Your answer is "yes"? A. Yes.

Q. And, as I understand it, it was entirely a matter of sliding the sacks over to the plank, sliding them down the plank, and then into this little building; is that right? A. Yes.

Q. And had you used a similar kind of plank before, like this one you were using that day?

A. Well, no.

Q. You don't recall ever using one just like that before? A. No.

Q. Well, this was kind of a balancing act as far as you were concerned, wasn't it? A. Yes.

Q. On your part of the job. Your father would slide the [72] sacks over, and would he lay them cross-wise on the plank?

A. No, he would stand them up.

Q. Oh, he would stand them up, so then you would pull them down onto the plank, is that right?

A. Yes.

Q. So that the length of the sack ran along with the length of the plank?

A. Well, we had the plank there and set the sacks up this way (indicating), and then kind of

(Testimony of Ralph Garett.)

put my arm around it and make it go down, slide it down.

Q. I see. So that your part of the job started in when your father stood the sack upright there at the end of the plank? A. Yes.

Q. All you had to do was roll it down onto the plank and slide it down? A. Yes.

Q. If I don't describe it correctly, why, you are entitled to correct me.

When you took over on one of these sacks, were you standing on the little porch of the building or were you down some of the steps?

A. No, I was standing on the little porch.

Q. Actually, the flat bed backed right up almost to the [73] edge of the porch, did it not, and then the steps were down under the flat bed?

A. Yes.

Q. Because the flat bed does extend out beyond the wheels of the truck, doesn't it? A. Yes.

The Court: May I ask—I just want to get this picture as clearly as possible—about how long was the plank from the truck to the floor of the house?

A. It was about 9 feet long.

The Court: All right, go ahead, Mr. Hamblen.

Q. (By Mr. Hamblen): But most of that plank was over the porch, wasn't it? A. Yes.

Q. Did the plank extend across the porch and through the door into the cabin? A. Yes.

Q. So that by the time you got the sack off the plank, you were inside the cabin, weren't you?

A. Yes.

(Testimony of Ralph Garett.)

Q. Most of the plank was over the porch and not over any gap, isn't that right? A. Yes.

Q. If a wheat sack fell off the plank, it fell on the porch, didn't it? [74] A. Yes.

Q. And, as I understand it, there were three steps up to the porch from the ground? A. Yes.

Q. And the flat bed was about three feet high, and how high was the porch?

A. Well, about a foot and a half.

Q. A foot—— A. Two feet.

Q. So there was only a difference in level there of a foot to a foot and a half between the cabin floor or the building floor and the floor of the flat bed; isn't that right? A. Yes.

Q. Something about a foot or foot and a half?

A. About two feet, I guess.

Q. About two feet, all right. Now, then, as I understand it, if a sack did fall off of the plank, it would fall on the porch of the building?

A. Yes.

Q. And you could take it there, then, by the ears and drag it on in on the floor? A. Yes.

Q. And you did do that, didn't you, occasionally? A. Huh-uh. [75]

Q. You didn't. This was the first time that any sack over-balanced, is that right? A. Yes.

Q. Now, when this particular sack over-balanced, your father had brought it up and set it down there, as I understand it, standing up; is that right?

A. Yes.

Q. And you came up in the usual way and took

(Testimony of Ralph Garett.)

hold of it, is that right? A. Yes.

Q. And you started to bring it down on the plank, did you? A. Yes.

Q. Did you have hold of the ears at the time?

A. No, I had my arm around it.

Q. You had your arm around it. Which arm did you have around it?

A. This one (indicating), the right.

Q. Your right arm? A. Yes.

Q. If this were the plank, you would come up on the right side—well, let's see, better get our sides straight here.

You would come up facing the back end of the truck, wouldn't you? A. Yes. [76]

Q. Standing on the porch, and then you would turn around with your right arm and grab the sack, is that right? A. Yes.

The Court: Were you on that same side of the plank? A. Yes.

The Court: On the right side, facing the truck?

A. Yes.

The Court: Is that right? The way Mr. Hamblen is there; that is, you would be on the right side of the plank facing the truck?

A. Well, like I was, the truck would be on this side (indicating).

The Court: On that same side Mr. Hamblen is on there.

Q. (By Mr. Hamblen): Step down here, Ralph, will you, and pretend that the witness box is the

(Testimony of Ralph Garett.)

truck. Now, here is your Dad standing up here; here is the cabin over here (indicating).

A. Go down this way and then grab it like that (indicating).

Q. With your right arm? A. Yes.

Q. Turn around and face back toward the cabin and ease the sack down on the plank? A. Yes.

Q. I see. [77]

The Court: You may sit down there.

Q. (By Mr. Hamblen): So this particular sack your Dad had set there, and you came up in that usual way and put your arm around it; is that right? A. Yes.

Q. And as you laid it down on the board——

A. I didn't lay them down; standing them like that, they would stand straight up.

The Court: You slid them down standing up on end? A. Yes.

Q. (By Mr. Hamblen): Oh, I see. I thought you laid them down more. A. Yes.

Q. You just held them standing up and slid them down that way? A. Yes.

Q. All right, now, at that time, with that sack, how far did you get with that sack when it started to lose its balance or get out of control?

A. Oh, about six, eight inches, I guess.

Q. You started to move it down the plank?

A. Yes.

Q. And did it start to go away from you on the other side or toward you? A. Yes, away. [78]

Q. Away from you. And how far away did it get?

(Testimony of Ralph Garett.)

A. Oh, got about like that (indicating), I guess, and Dad got hold of it.

Q. About, would you say, a 45-degree angle?

A. Yes.

Q. You know what a 45-degree angle is, don't you? A. Uh-huh.

Q. About halfway from the perpendicular to a horizontal position. And did you call to your Dad as it started?

A. No, he was standing right there.

Q. He was standing right there?

A. Just a little way away from it.

Q. He didn't have his hands on it at that time, did he? A. No.

Q. As it started to fall. And, apparently, he saw it and reached out and held it in that 45-degree position? A. Yes.

Q. And you ran around the plank on the other side, is that right? A. Yes.

Q. Pushed it back up? A. Yes.

Q. Didn't have any trouble pushing it back up, did you?

A. Oh, took a little strain, but I did.

Q. Took a little strain? [79] A. Yes.

Q. Well, you were able to do it, though, weren't you? A. Yes.

Q. Then you slid it on down and in the regular way? A. Yes.

Q. So all your Dad did was reach out, when he saw the sack tipping over, and hold it there?

A. Yes.

(Testimony of Ralph Garett.)

Q. He didn't stumble or slip or fall off the truck, did he? A. No.

Mr. Hamblen: That is all.

Mr. Raftis: Just a couple of questions.

Redirect Examination

Q. (By Mr. Raftis): Ralph, just a little further on the position that your father assumed when he grabbed this sack. Did this sack start to get away from you suddenly, or just describe how that was?

A. Well, I don't know, it just kind of went over easy, and then I thought I still had it so I never said anything, started falling a little faster.

Q. In other words, was the sack getting away from you? A. Yes. [80]

Q. And I believe you stated your father did not have hold of the sack at that time?

A. That's right.

Q. And state whether or not then he made a sudden lunge, or what did he do to grab hold of that sack before it fell? I don't want to testify for you, but you tell the Court what your father had to do to catch that sack. A. He made a quick——

Q. Huh?

A. Made a quick jerk at it, I guess, or grab.

Q. Well, was it something that came up suddenly? A. Yes.

Q. And from where he was standing, just describe how he ran over and grabbed that sack?

A. He took about half—about a step, I guess, and then reached down and grabbed.

(Testimony of Ralph Garett.)

Q. Was the sack falling when he grabbed it?

A. Yes.

Q. And then he held it there with one hand while you ran around the truck to get around the other side to help [81] push it back up?

A. Yes.

Q. And were you trying to hold it from the other side? A. Yes.

Q. And you stated, I think, it was about at a 45-degree angle when your father caught it? A. Yes.

Mr. Raftis: That is all.

Recross Examination

Q. (By Mr. Hamblen): If he had let it fall, it would have dropped on the porch, wouldn't it?

A. Yes.

Q. You had your back to him at the time that the sack started to go over, didn't you? A. Yes.

Q. And, as you have said, it started easy at first, didn't it?

A. Yes, got around where I was using both hands, you know, both straight at it.

Q. First, it started to go a little bit, you had one arm; then you put another one around yourself, did you?

A. Well, yes, I was facing about like that (indicating) and standing up in here.

Q. And it went about 45 degrees over and you had both arms around it at that time? A. Yes.

Q. And then is when your dad reached out and grabbed it, is that right? [82] A. Yes.

(Testimony of Ralph Garett.)

Q. He hadn't grabbed it before that, had he?

A. No.

Q. And you were holding it in that angle, were you, when he took hold of it?

A. Yes, trying to. I didn't have my hands like that.

Q. Well, no, but you had them both on the sack?

A. Yes.

Mr. Hamblen: That is all.

Mr. Raftis: I might ask just a couple of more questions, your Honor.

Redirect Examination

Q. (By Mr. Raftis): Ralph, if your father hadn't grabbed the sack, would it have fallen to the ground? A. Yes.

Q. Had it gotten out of your control?

A. Yes.

Q. Now, after your father grabbed the sack and you got it straightened up, how long after that was it that you noticed your father holding his chest?

A. Well, we got it straightened up there and I took the sack in the building there, and then I come back out and there he was. [83]

Q. Would it be almost immediately, that is, within a minute? A. Yes.

Q. And had he shown any symptoms or signs of pain prior to the time he grabbed the sack?

A. No.

Mr. Raftis: That is all.

(Testimony of Ralph Garett.)

Recross Examination

Q. (By Mr. Hamblen): Well, I don't want any misunderstanding on this, Ralph, I thought you said if the sack had fallen, it would have fallen on the porch? A. Yes.

Q. That is what you meant when you said "ground" here with Mr. Raftis; you meant it would have fallen down on the porch of the building?

A. Yes.

Q. Now, your father didn't straighten the sack up; he just held it there, didn't he? A. Yes.

Q. You were the one that straightened it up?

A. Well, we both did.

Q. He still had hold of it? A. Yes. [84]

Q. But while you were going around, he didn't attempt to straighten the sack up? A. No.

Q. He just held the one hand against the building and one hand on the sack like that (indicating); isn't that right? A. Yes.

Mr. Hamblen: All right, that is all.

Redirect Examination

Q. (By Mr. Raftis): Just one final question: Was he leaned over when he was doing that?

A. Yes.

The Court: When you got these sacks down into the building, you slid them up on end or slid them down on end on the plank? A. Yes.

The Court: Then you pulled them over against the wall, laid them down on the floor?

A. Well, just standing them up.

(Testimony of Ralph Garett.)

The Court: Oh, you stood them up?

A. Against each other.

The Court: Oh, you slid them off away from the door, I suppose? [85] A. Yes.

The Court: There was room for all of them in there standing on end without double-decking them?

A. Yes.

The Court: That is all.

Mr. Raftis: That is all.

Your Honor, I would like to call Dr. McKinlay before noon.

The Court: Oh, yes. I wanted to ask the boy another question.

Mr. Raftis: Just go back on the stand.

The Court: This was seed wheat that your father was bringing out from Colville, I understand?

A. Yes.

The Court: To sow the fall or winter wheat, wasn't it? A. Yes.

The Court: Was that the only load that he got that fall? A. Yes.

The Court: This was the first load he had brought out in the fall of 1953? A. Yes.

The Court: That is all my questions. [86]

Recross Examination

Q. (By Mr. Hamblen): He handled other loads in other years and you had helped him, hadn't you?

A. Yes.

The Court: All right.

Mr. Raftis: That is all.

(Witness excused.)

Mr. Raftis: Dr. McKinlay, would you come forward, please?

D. WILSON McKINLAY

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Raftis): Dr. McKinlay, will you give your name to the reporter, please, for the record? A. D. Wilson McKinlay.

Q. Where do you reside, Doctor?

A. 3504 Riverview Drive, Spokane.

Q. What is your profession?

A. I am an M.D., family doctor.

Q. And for how long have you been engaged in the practice of your profession last past? [87]

A. Since 1938, I finished my training.

Q. Will you state for the record of what schools you are a graduate? A. Medical school?

Q. Yes?

A. The College of Medical Evangelists, Los Angeles.

Q. Do you engage in the general practice of medicine? A. I do.

Q. And where is your office in Colville?

A. Spokane. 526 West Garland.

Q. Pardon me, I forgot I was away from home. I didn't get your answer?

A. 526 West Garland Avenue.

(Testimony of D. Wilson McKinlay.)

Q. You are in the Garland District in Spokane?

A. That's right.

Q. How long have you been in Spokane, Doctor?

A. Since the fall of '45.

Q. And in the course of your practice, Doctor, state what particular diseases you treat, or is it a general practice?

A. Well, there is one wag said, "I treat the skin and its contents." I am a family doctor.

Q. It is a general practice?

A. That's right.

Q. In the course of your practice, do you have stomach, [88] heart disorders, and things of that nature? A. Yes, sir.

Q. Comes within your general practice. I will ask you to state, Doctor, if you had occasion, on or about September 24, 1953, to attend a Ralph H. Garett? A. I did.

Q. Will you relate briefly the circumstances of your being called to attend him and then what happened?

A. Yes. I was on the emergency call that 24-hour period for the Spokane County Medical Society, and in the evening, I have forgotten the hour, I was called from the Medical Service office to take a call at the Pedicord Hotel for a Mr. Ralph Garett.

I hurried down there to the hotel and was taken to his room.

Q. And did you then meet Mr. Garett?

(Testimony of D. Wilson McKinlay.)

A. I met Mrs. Garett first and then Mr. Garett on the bed.

Q. Had you ever met or known these parties before? A. No.

Q. Will you state for the record, Doctor, what notes you have showing the history for the diagnosis you made at the time of your arrival at the hotel?

A. Well, the record I have is rather brief on my card. It said: "Patient was down from Colville for x-rays [89] of the stomach ordered by Dr. Lowell."

Then for history, all I had was: "Unloaded wheat sacks before leaving for Spokane. Pain all the way to Spokane; had pain in chest, had ignored it, thinking it was associated pain from stomach. Pain kept increasing until seen in the hotel."

And I gave him half grain of morphine and sent him to the hospital by ambulance.

Q. Do you recall of your own recollection anything further that was said or done when you first met Mr. Garett?

A. In regard to his illness?

Q. Yes?

A. Nothing more than that they thought this was stomach complication, thinking possibly it was perforated, you know. They were a little surprised when I said, "No, I think this is a coronary. It is very serious, we must get him to the hospital right away." But they were still thinking in terms of it being the condition for which he was being treated and for which he was sent here for x-rays.

(Testimony of D. Wilson McKinlay.)

Q. Did he give you some history or his wife give you some history of prior stomach situation?

A. Yes, that is what she greeted me with was the fact he was down here for x-rays of the stomach. He had been [90] having pain in his stomach.

Q. Well, what then did you do with reference to further treatment?

A. Hospitalized him and started the usual procedures that you would for a man in acute shock, as he was given oxygen and intravenous fluid and heavy doses of opiates to relieve his severe pain. I left other orders, but there was not time to carry them out, such as running an electrocardiogram, because the man died the following morning.

Q. When you first saw Mr. Garett, will you state to the Court just what his condition was with reference to being in pain or otherwise?

A. When I first saw him?

Q. Yes?

A. Well, he was in extreme pain. It was very apparent from the pallid expression, the color of his face and the anguished expression and the fact he couldn't lie still. It was a typical picture of a man suffering from coronary heart disease—shock, blood pressure was down, pulse was rapid.

Q. Did he give you any particular history of this episode of unloading the wheat that evening?

A. I don't believe he did, no. I don't think I had any history fom him, to speak of. I know he tried to [91] answer questions, but he was in such pain his wife interjected the answers. And, of course,

(Testimony of D. Wilson McKinlay.)

they were both very much upset and I wasn't trying to get history at the time.

Q. Yes, that's right.

A. It was a matter of taking care of acute shock, and whether I was correct in diagnosing it as coronary or not, the treatment would be the same—to get him to the hospital to determine whether or not it might have been a perforation of a viscus, such as stomach or gall bladder, but the original picture was so typical of coronary, I felt sure that is what it was, and it turned out that it was.

Q. Will you relate briefly what transpired after you got him to the hospital?

A. The usual routine care by the nurses under my orders, setting up intravenous fluids and that sort of thing. Is that what you mean, nursing care?

Q. Yes.

A. The usual care, giving him oxygen as quickly as we could get the apparatus set up, and I don't recall exactly how much more opiates we had to give. I had already given him a half a grain at the hotel, which is twice the usual dose we give for severe pain, but for coronary type pain it usually takes up to a half [92] grain.

Q. Did this condition of distress and pain continue up until the time Mr. Garett passed away from the time you first saw him?

A. Oh, I'm sure the pain—I couldn't answer that accurately, I wasn't with him. Furthermore, we kept him properly sedated. If the pain would start to show up, as is the rule with all such pa-

(Testimony of D. Wilson McKinlay.)

tients, we have to fight the pain in order to give the heart as much chance as possible, so that the order was to give him all of the morphine that he would require to keep him from suffering.

Q. The purpose of my query was to determine whether or not there had been any other event or agency that had intervened to account for this pain other than what existed when you first saw him?

A. Well, not so far as I know, there was nothing further.

Q. When did Mr. Garett die, what time of day?

A. I didn't put that on my card. It might be—it should be on the death certificate.

Mr. Raftis: Do you have that death certificate, Mr. Hamblen? Do you mind if we put that in evidence?

Mr. Hamblen: No, I was going to if you didn't.

The Court: You want to put it in evidence?

Mr. Raftis: Yes, your Honor. [93]

The Court: That would be Plaintiff's 3?

The Clerk: Yes, your Honor.

A. The hour should be on there. I don't recall exactly.

Mr. Raftis: I will show it to you in just a moment.

Q. Handing you Plaintiff's Exhibit 3 for identification, Doctor McKinlay, will you examine the record, certified record, and state if that is a true and correct record of the certificate of death which you prepared for Ralph H. Garett?

A. It is, yes.

(Testimony of D. Wilson McKinlay.)

Q. And your name appears at the bottom?

A. Right there, yes (indicating). It is typewritten in there, the signature.

Q. A certified copy? A. Yes.

Q. Shows 11:20 a.m.

The Court: All right.

Q. (By Mr. Raftis): That would be on the 25th? A. That's right.

Mr. Raftis: We will offer this in evidence, your Honor, as Plaintiff's Exhibit No. 3.

Mr. Hamblen: Join in the offer.

The Court: It will be admitted. [94]

(Whereupon, the said certified copy of death certificate was admitted in evidence as Plaintiff's Exhibit No. 3.)

Pltf. Exhibit 3 For Identification

97

Certified Copy of Death Certificate

WASHINGTON STATE DEPARTMENT OF HEALTH

DIVISION OF VITAL STATISTICS

Burial Permit No. 7902

CERTIFICATE OF DEATH

Registered No. 1587

Reg. Dist. No. M-1

PLACE OF DEATH
COUNTY: SPOKANE
CITY (If outside corporate limits, write RURAL and give township): SPOKANE
c. LENGTH OF STAY (In this place): 1 day
FULL NAME OF (If NOT in hospital or institution, give street address or location) HOSPITAL OR INSTITUTION: St. Lukes Hospital

2. USUAL RESIDENCE (Where deceased lived. If institution: residence before admission.)
a. STATE: Washington
b. COUNTY: Stevens
c. CITY (If outside corporate limits, write RURAL and give township) OR TOWN: Colville
d. STREET (If rural, give location) ADDRESS: 9 mi. S.E.

a. (First)	b. (Middle)	c. (Last)
Ralph	Howard	Garrett

4. DATE OF DEATH: (Month) 9 (Day) 25 (Year) 53

5. SEX	6. COLOR OR RACE	7. MARRIED, NEVER MARRIED, WIDOWED, DIVORCED (Specify)	8. DATE OF BIRTH	9. AGE (In years) last birthday	If Under 1 Yr. Months	Days	If Under 24 Hrs. Hours	Min.
M	W	M	10/15/10	42				

10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Farmer
10b. KIND OF BUSINESS OR INDUSTRY: Self
11. BIRTHPLACE (State or foreign country): Nebraska
12. CITIZEN OF WHAT COUNTRY? USA

FATHER'S NAME: Franklin Garrett
14. MOTHER'S MAIDEN NAME: Louise Kroesing
WAS DECEASED EVER IN U.S. ARMED FORCES? (No or unknown) (If yes, give war or dates of service)
16. SOCIAL SECURITY No.: 520-05-8066
17. INFORMANT: Mrs. Nova Garrett

CAUSE OF DEATH (Only one cause per line (a), (b), and (c))

This does not mean the mode of dying, such as heart failure, asthenia or anoxia, means the disease, injury, or complication which caused death.

MEDICAL CERTIFICATION

I. DISEASE OR CONDITION DIRECTLY LEADING TO DEATH* (a) Coronary Occlusion — Interval Between Onset and Death:

ANTECEDENT CAUSES
Morbid conditions, if any, giving rise to the above cause (a) stating the underlying cause last.
Due to (b) Arteriosclerosis
Due to (c)

II. OTHER SIGNIFICANT CONDITIONS
Conditions contributing to the death but not related to the disease or condition causing death.

DATE OF OPERATION
19b. MAJOR FINDINGS OF OPERATION
20. AUTOPSY? Yes ☒ No ☐

ACCIDENT (Specify) SUICIDE HOMICIDE
21b. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office bldg., etc.)
21c. (CITY, TOWN, OR TOWNSHIP) (COUNTY) (STATE)
TIME OF INJURY (Month) (Day) (Year) (Hour) m.
21e. INJURY OCCURED While at work ☐ Not while at work ☐
21f. HOW DID INJURY OCCUR?

I hereby certify that I attended the deceased from 9-24, 1953, to 9-25, 1953, that I last saw the deceased alive on 9-25, 1953, and that death occurred at 11:20 A.m., from the causes and on the date stated above.

SIGNATURE (Degree or title): L.McKinlay, M.D.
23b. ADDRESS: 520 W. Garland
23c. DATE SIGNED: 9-26-53

BURIAL, CREMATION, REMOVAL (Specify): burial
24b. DATE: 9/25/53
24c. NAME OF CEMETERY OR CREMATORY: Highland Cemetery
24d. LOCATION (City, town, or county) (State): Colville Wash
REC'D BY LOCAL REG.: 9-25-53-Temp.
REGISTRAR'S SIGNATURE: 9/25/53 Wm.R.Murlin,M.D.
25. FUNERAL DIRECTOR ADDRESS: Moser-Egger Fun'l. Home Colville, Wash.

I Hereby Certify, *That the foregoing is a true copy of the certificate of death of*

Ralph Howard Garrett

filed with the Bureau of Vital Statistics of the Board of Health of the City of Spokane, Washington.

This is the second certified copy issued on above record.

Katherine Manetsch
Dep. Registrar

Spokane, Wash., Oct. 8, 1953

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(Testimony of D. Wilson McKinlay.)

Q. (By Mr. Raftis): Dr. McKinlay, after the death of Mr. Garett, at or about 11:20 a.m. on September 25, 1953, did you cause to have an autopsy performed upon his body?

A. Yes, I did.

Q. Was that under your direction?

A. That, of course, is according to law, it would have had to have been done by law, anyway, but, of course, we always want to have verification or an opportunity to find out for sure what the cause of death was to see if our clinical judgment was correct, and so I ordered it.

Q. Did some other medical doctor assist you in that work?

A. The autopsy was performed by Chris Christianson, the Pathologist at St. Luke's Hospital.

Q. Was that at your request and under your direction?

A. Yes and no. I always ask for autopsies on people who have passed away if I am not completely positive of their condition. In the hospital, we also have an effort made to get autopsies on all patients who die in the hospital for clinical purposes, and, of course, in [95] this case, as I stated a moment ago, it would have had to have been performed by law, anyway, since I was not the family doctor and he had not been seen within 24 hours by his own doctor.

Q. Well, then, in any event, an autopsy was performed? A. It was done, yes.

(Testimony of D. Wilson McKinlay.)

Q. And are you familiar with the results of that autopsy? A. Yes, sir.

Q. That is what I was getting at. What did the autopsy show with reference to the condition and cause of death of Ralph H. Garett?

A. The autopsy showed an advanced condition of arteriosclerosis of the coronary arteries, known non-technically as arteriosclerosis, with marked narrowing of the lumens of two of the arteries and complete closure of one, with some scar tissue of the muscle area supplied by that particular artery, indicating an old infarct.

Mr. Hamblen: Indicating what?

A. An old infarct, i-n-f-a-r-c-t—I'm sorry—an old scar, indicating that that had closed sometime in the past preceding his present illness.

It showed a marked narrowing of the anterior circumflex descending artery, with a fresh thrombus plugging it, and with the muscle supplied by that particular artery hemorrhagic and, under microscopic [96] examination, already undergoing necrosis, verifying the fact that he had had an acute coronary attack very recently; in other words, verifying the clinical diagnosis that we had made both at the hotel and again in the hospital.

Q. This last condition you have described, the acute condition, was that the direct cause of the death of Ralph H. Garett, in your opinion?

A. Yes, sir.

Q. And when you use the word "acute," what does it signify? I don't know.

(Testimony of D. Wilson McKinlay.)

A. "Acute" means something sudden.

Q. I see. And you heard the testimony of Mr. Garett's son here a few moments ago, I take it?

A. Yes, I did.

Q. Now assuming the correctness of the statement of the son, that on September 24, 1953, at the home of Mr. Garett near Colville, Washington, he and his son were engaged in unloading sacks of wheat weighing around 140 pounds each, and the sacks of wheat being handled by the father in the manner described by his son, namely, pulling them along the bed of the truck and leaning them on that plank, where his son would take the sacks into the granary; assuming that suddenly one of the sacks got away from the son and was on the plank; the [97] father, who was standing within a step or so away, made a sudden lunge forward and grabbed the sack with one hand, the sack weighing around 140 pounds, and bracing himself against the granary with the other hand, and being in a forward and stooped-over position and holding the sack for sometime, a few seconds, at least, until his son could get around the truck to assist in pulling the sack of wheat back; and assuming that in that position and as a result of that sudden happening, the father, Mr. Garett, helped straighten the sack and then immediately thereafter felt a severe pain in his chest which caused him to cease any further work; and assuming that thereafter he was unable to eat and the pain persisted and he started for Spokane, and by the time he had arrived here, was

(Testimony of D. Wilson McKinlay.)

in extreme physical pain, taken to the hospital, where you were called to attend him; assuming all these facts as correct, Doctor McKinlay, I will ask you if, in your opinion, the coronary attack which you have described was brought about by this sudden strain in catching and holding and lifting this particular sack of wheat?

Mr. Hamblen: Just a minute, Doctor.

We object to the question on the ground that it is a hypothetical question, incorrectly states the facts in part, with particular reference to the assumption that [98] the father made a sudden lunge, which was unsupported by the evidence, and on the further ground that it is incomplete in that it doesn't include the rest of the facts, namely, that he had been in the process of moving and dragging some eight or nine other heavy sacks of wheat along the flat bed of the truck.

Mr. Raftis: Yes, well, I am willing to include those additional factors.

The Court: You heard the testimony of the son?

A. I did, yes.

The Court: Well, assume as a part of the question, then, that the father had previously dragged across the truck in the manner described here—was it nine sacks, I believe?

Mr. Raftis: Approximately nine sacks.

The Court: And also modify the question that, instead of lunging, taking a sudden lunge for the sack that was over-balanced on the plank, that the father suddenly grabbed——

(Testimony of D. Wilson McKinlay.)

Mr. Raftis: Yes, that will be satisfactory.

The Court: ——suddenly grabbed the sack. With those alterations, will you undertake to answer the question?

A. I think the best way I can answer it would be this:

That any time you have narrowed coronary arteries, and, [99] as the pathologist stated, one of these was narrowed to about one-third of its normal diameter, the amount of blood that would go through that coronary to supply the cardiac muscle would be a definite limited amount of blood, which would be sufficient for a man to do ordinary exertion, if done slowly so that he does not build up a tremendous amount of need for blood in the heart.

Assuming, as has been asked, that he had been dragging these sacks across, and assuming that he was doing it, as some of the rest of us would, as we have done in the past years, was dragging wheat sacks around, he was moving at a steady pace and having no pain while doing that; but when he made this extra exertion of supporting his own weight by leaning across the distance from the truck to the house and supporting partially the weight of the sack, and immediately after had the pain; it would be reasonable to assume that the amount of blood needed for the heart to take care of the extra exertion above what he had been doing would have been sufficient to produce an anoxia of the heart muscle, which in turn sets up the chemical changes that produce a thrombus, and the thrombus itself

(Testimony of D. Wilson McKinlay.)
then acts as a cork or a plug, stopping all blood from going through. [100]

Does that answer your question?

Mr. Raftis: Yes.

The Court: The thrombus is what might loosely, in lay language, be called a blood clot? That's right, isn't it?

A. That's right, yes.

Q. (By Mr. Raftis): And from your autopsy and examination, you determined this blood clot, I believe, to be rather fresh or new?

A. Yes, sir, it was a recent blood clot.

Q. Yes. And assuming, Doctor, as we have already stated, that the pain appeared immediately, would that be a natural consequence of this condition that you have related that you found later? Would that bring on the sudden pain?

A. The sudden onset of pain is always associated with the sudden plugging of the vessel.

Q. In other words, that, in your opinion, occurred while he was engaged in handling this single sack, assuming that the pain appeared immediately thereafter or within a few seconds thereafter?

A. Well, assuming the story I heard, I would certainly say that the closure of that vessel took place while he was holding the sack or within seconds thereafter. In other words, it takes a few seconds, at least, for the [101] blood clot to form sufficiently to stop blood going through, and, if I might explain by other types of things, we are all acquainted with such as a man going deer hunting and

(Testimony of D. Wilson McKinlay.)

he gets along fine until he picks up the deer. He picks up the deer and, wham, he has a pain and the onset of his coronary when he takes this unusual extra exertion.

The Court: The pain, the typical pain, is a chest pain, isn't it, from coronary?

A. That is typical, yes. It may be abdominal. Many times it is misunderstood and patients sometimes are even rushed to surgery for operations on a stomach or a gall bladder, only to find to the doctors' chagrin that it was a coronary and not what he thought it was and the patient not helped by surgery. But, typically, it is a chest pain, sir.

The Court: I had hoped that we could get through with Dr. McKinlay, let him go back to his office. I think that would be impossible, unless we run quite late, because we would have some substantial cross examination here, I assume.

Mr. Raftis: Doctor, can you be back at 2 o'clock?

A. Yes, I will be.

The Court: I will leave it with you, which do you prefer 1:30 or 2? [102]

A. 1:30, I would prefer.

The Court: All right, I will recess, then, until 1:30. I think we can all get back by that time.

A. Thank you.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.)

1:30 o'clock p.m., October 21, 1954.

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit:)

D. WILSON McKINLAY

having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Raftis): Dr. McKinlay, based upon the history of the facts in this case, as heretofore pointed out, state whether or not, in your opinion, the death of Ralph H. Garett on [103] September 25, 1953, was directly due and caused by this injury to his heart suffered in the manner heretofore related, namely, the handling of this sack of wheat that was in the process of falling on this plank that has been described.

Mr. Hamblen: Objected for the same reason as before, your Honor.

The Court: Well, I think it might be objectionable in assuming as a fact that he suffered an injury to his heart, which is an issue in controversy here.

I think you might ask him if, in his opinion, it was caused by an injury which he sustained at that time. In other words, my objection to your question, Mr. Raftis, is that it seemed to state as a fact that he suffered an injury to his heart.

Mr. Raftis: Withdraw the question, I will re-

(Testimony of D. Wilson McKinlay.)

frame it, your Honor. I am trying to get started on a trend here.

Q. Doctor McKinlay, in your opinion, did the sudden strain experienced by Mr. Ralph H. Garett in taking hold of the single sack of wheat which was about to fall from the plank, as was heretofore described and discussed, in your opinion, was that sufficient to cause damage and injury to his heart?

Mr. Hamblen: We object again when the question assumes there was a sudden strain. [104]

Mr. Raftis: Well, I was trying to keep out any hypothesis.

Mr. Hamblen: Well, if you are stating it in a hypothetical way, assuming there may have been a sudden strain.

Mr. Raftis: Well, let's put it that way.

The Court: Yes.

Mr. Raftis: Go at it piece-meal.

Q. In your opinion, Dr. McKinlay, what would have been the effect on the heart of Ralph H. Garett of the acts which he did, which have been previously testified to by his son and which were contained in the hypothetical question which I asked you with respect to this occurrence on September 24, 1953?

The Court: The record may show your continuing objection.

Mr. Hamblen: Yes.

The Court: Which includes the former question.

Mr. Hamblen: That's right, the same objection.

(Testimony of D. Wilson McKinlay.)

The Court: Without repeating it. All right, go ahead, Doctor, you may answer it.

A. Well, I best understand the question. I would say that, assuming the history given by the son as accurate and with my own personal knowledge of wheat sacks, as I try to visualize what happened, I would say that there certainly was sufficient extra exertion to produce a [105] sudden strain on the heart sufficient to precipitate such an acute coronary occlusion.

Does that——

Q. (By Mr. Raftis): Yes, that answers the question.

In your opinion, Dr. McKinlay, was the injury to the heart, having in mind the history of the case, due to natural causes?

A. Well, certainly, natural causes had built up a situation to produce a weakened heart, but the history of sudden exertion would, I suppose—I don't know the legal end of it—but from the medical standpoint—would have precipitated an occlusion in that damaged heart.

Q. My question was, was the injury due, in your opinion, to natural causes, or was it due to this sudden exertion, having in mind the history of the case?

A. Well, may I ask for a little clarification, Judge?

The Court: Yes, all right.

A. Are we to assume the condition of the heart?

Q. (By Mr. Raftis): Yes, as you found it later.

(Testimony of D. Wilson McKinlay.)

A. As the base line, so to speak? Then, are you asking, did he die from natural causes as a result of the changes in the blood vessels of the heart, or was there something superimposed on that?

Q. That is what I am getting at, was there something in [106] addition to natural causes which brought about his death?

A. Well, then, that would be repetition of what I have already stated—I thought I had—that the condition of the heart was definitely damaged preceding this incident.

Q. That's right.

A. But the sudden exertion, as described, would be sufficient, in my opinion, to have precipitated or produced the thrombus which produced his death.

Q. I believe you have testified that there was a limited flowage of blood in the heart normally?

A. In that particular heart, yes.

Q. Yes.

A. It had been closed down to approximately one-third its normal diameter.

Q. And from what you have stated, I believe, that he apparently was able to pull these wheat sacks over the plank without suffering any pain?

Mr. Hamblen: Object to that. The doctor isn't a witness who can answer the question.

The Court: I think it is leading, too.

Mr. Raftis: It is a little leading, I will agree with your Honor.

Q. Let me put it this way: Had he not suffered this [107] sudden exertion that has been related,

(Testimony of D. Wilson McKinlay.)

what would you say, Doctor, with reference to the likelihood as to his continuing to live, that is, as to a period of time in the future?

A. Well, I am not God, all I could state would be that people with damaged coronary arteries continue to live until something, either a sudden severe exertion produces the thrombus or until the vessels finally close down to the point that they cannot carry enough blood to keep the heart going, so that this man did have an acute thrombus which plugged the artery that had been carrying sufficient blood, because he was alive before, without pain, it had been carrying enough for his normal living. So I would have to assume, from my knowledge of heart function and coronary disease, that he would have lived an indefinite period if he had not had some acute strain to produce that.

Indefinitely, in my opinion, whether it would be hours, days, or years.

Q. Well, yes, I understand that. From your previous testimony, I believe I would be correct in stating, that there was not normally a sufficient shutting off of the bloodstream to bring about that condition without the aid of some unusual or unforeseen strain; is that correct? [108]

A. Some unusual condition.

Q. Yes, that is what I mean. And I believe you have, or have you, stated that, in your opinion, did this exertion that has been testified to directly cause or contribute to the death of Ralph H. Garett?

(Testimony of D. Wilson McKinlay.)

A. In my opinion, the history as given could very definitely indicate the added strain that would be necessary to produce the coronary.

Q. In your opinion, Dr. McKinlay, would driving an automobile for two or three miles have caused the condition that you found later, having in mind the history of the case?

A. Would driving a car two or three miles be sufficient strain?

Q. Yes?

A. To produce a coronary occlusion?

Q. Yes?

A. Not if it is ordinary driving. If something unusual happened while driving, it could be, a sudden fright or sudden physical exertion.

Q. In other words, it would take something out of the usual routine to bring that condition on suddenly?

A. That is definitely my opinion, surely. Driving a car is not difficult where a person knows how.

Mr. Raftis: You may examine, Mr. Hamblen.

Cross Examination

Q. (By Mr. Hamblen): Dr. McKinlay, you filled out the medical certification in the death certificate, which is Exhibit 3, didn't you?

A. Yes, I did.

Q. And filled it out, of course, on the basis of the information which you had?

A. Plus the autopsy.

(Testimony of D. Wilson McKinlay.)

Q. Plus the autopsy. And you participated in that with Dr. Christianson?

A. That's right.

Q. And you had no information from which you could fill in anything under Paragraph No. 20a, which leaves a blank for specifying an accident?

A. That is correct, I had no information at the time by which I could fill that in.

Q. You had no history or information given to you by either of the Garetts?

A. No, I didn't.

Q. Of any accident. And neither did you fill in Blank 21f with reference to how did injury occur?

A. That's right.

Q. You had no information?

A. I had no information of the material brought out today. [110]

Q. The only history you had was the bare history you testified to, that he was lifting wheat sacks, that was all they had an opportunity to tell you?

A. They didn't even tell lifting, just said unloading wheat sacks.

Q. Unloading wheat. This arteriosclerosis which you found there, from your diagnosis and from the postmortem, was an advanced type, was it not?

A. Yes, it was.

Q. And, as you have testified, one of the coronary arteries was already closed?

A. That's right.

Q. Are there two arteries, two coronary art-

(Testimony of D. Wilson McKinlay.)

eries? A. There are several.

Q. Several? A. Yes.

Q. Do I understand that only one remained open?

A. Well, there are three main coronaries, and then each of them subdivides, and it was one of the main branches, the anterior descending circumflex, I believe, is the one that Dr. Christian described the one that had closed this time.

Q. I see. But the one that was feeding blood to the heart apparently was two-thirds closed?

A. No, this particular vessel, this branch, this one that [111] plugged off, is the one he described. Because, naturally, that is the place where he made his cross-section, through this thrombus, and that was the one he describes the diameter.

Q. Now, do I understand that thrombus forms, thrombus is a blood clot, isn't it?

A. Blood clot, that's right.

Q. A clot of some kind?

A. It is a blood clot always.

Q. And that forms, in the case of a person suffering from arteriosclerosis, because the artery is too narrow and, as a result of being too narrow, sometimes—did you refer to it as anoxia?

A. Anoxia, lack of oxygen of the heart.

Q. And the blood coagulates at that point, is that right? A. That's right.

Q. Forming a clot? A. That's right.

Q. So that the thrombus forms in part, at least, because the artery is too narrow, isn't that right?

(Testimony of D. Wilson McKinlay.)

A. Because it is too narrow and diseased.

Q. Too narrow and diseased?

A. Yes, the previous disease which has produced the narrowing produces a weakened artery.

Q. And the thrombus may form, under advanced arteriosclerotic [112] conditions, without any outside exertion of any kind, may it not?

A. Yes, sir.

Q. Just by reason of the fact that the artery is too narrow?

A. It does occasionally occur that way.

Q. And, as a matter of fact, people die of coronary occlusion or thrombosis as a result of excitement? A. That's right.

Q. Or just bending over or climbing steps?

A. Those are all extra exertion, yes, that's right.

Q. Well, they even die in their sleep, don't they, from coronary?

A. Yes, they do in advanced disease of coronary.

Q. From no apparent reason whatsoever?

A. You mean no outside known cause?

Q. That's right.

A. Apparently is right. There may be causes that we are not aware of, such as a bad nightmare or something.

Q. At least in this case, we can say, can't we, Doctor, that this man had an artery which was very severely damaged by reason of this development of arteriosclerosis over a period of years?

A. A period of time; we don't know how fast it forms.

(Testimony of D. Wilson McKinlay.)

Q. A period of time. And we can also say that the [113] thrombus which formed, the new thrombus which you referred to in your testimony, was caused, at least in part, by virtue of this narrow artery, as you have just testified?

A. That's right.

Q. It wouldn't have happened, in other words, the thrombus wouldn't have formed there, if the artery hadn't been restricted, would it?

A. That is correct.

Q. As I gather from your testimony, you are of the opinion that this exertion which has been testified to in unloading wheat was also a, I think you used the word, precipitating cause?

A. Which exertion was that?

Q. The unloading of wheat.

A. You mean dragging the sacks?

Q. Well, let's refer to the whole process, first, dragging the sacks and reaching out and holding the sack.

A. Well, dragging the sacks, I don't think would be a precipitating factor, Mr. Hamblen, because he was apparently working along slowly at the rate at which he could work. I say that because he had no pain. If we assume that that type of exertion was going to cause damage, then he would have been having what we call angina pectoris, he would have been having heart pain [114] from exertion or effort pain, which would stop when he would stop exerting himself.

Q. Well, you are assuming he didn't have

(Testimony of D. Wilson McKinlay.)

pain—— A. That's right.

Q. ——prior to the time. And, as a matter of fact, I gather from your testimony, you have had some experience with wheat sacks?

A. Oh, yes.

Q. And it takes just as much exertion to lift a sack up on end like this (indicating), doesn't it, as to reach over and hold a sack at an angle of 45 degrees?

A. Well, that all depends on how you are doing it, Mr. Hamblen.

Q. It all depends, doesn't it?

A. According to the story of the boy, there would be a tremendous amount of exertion more for me to suddenly reach out supporting myself on the side of the house and grabbing a sack and holding it in an awkward, strained position, would cause a great deal more effort than slowly to lift a wheat sack up.

Q. That would just be your personal opinion, wouldn't it?

A. I think that is common sense.

Q. You think it would take more effort physically to reach out and hold a wheat sack in a stationary position than it would to lift it up from the ground to a vertical [115] position?

A. I didn't understand——

Q. With all that weight?

A. I don't know as I am supposed to build on this subject or not.

Q. Probably that is neither here nor there.

(Testimony of D. Wilson McKinlay.)

A. It is my opinion he certainly would have worked much harder grabbing that grain because of the emotional factor forcing the heart to go faster because something out of the ordinary was occurring.

Q. Well, let's put it this way: In the condition which you found at the postmortem of an artery two-thirds closed and another artery entirely closed off, the exertion which a man might undergo in dragging nine or ten wheat sacks and raising them up, the 140 pounds alone, would be enough to cause a thrombosis to form, would it not?

A. Not necessarily at all.

Q. Not necessarily, but it could be, couldn't it?

A. It depends on the speed with which he is working.

Q. That's right. And if kept on doing that with sack after sack, he would develop a fatigue, which itself could be enough to cause a thrombosis under those conditions, isn't that right?

A. Well, you are building up something that wasn't [116] presented in the testimony.

Q. I know I am. I am asking you.

A. In that particular case, certainly, a man could produce enough exertion getting up on his feet and sitting down and waving his arms and sitting down and waving his arms to produce a heart embarrassment if he had a coronary.

Q. The point I am getting at, you can't say that that thrombus wouldn't have formed, in whole or in part, from the exertion which Mr. Garett went

(Testimony of D. Wilson McKinlay.)

through in dragging and lifting those nine wheat sacks, entirely apart from the matter of holding the final sack in position, can you?

A. No, I can't.

Q. You can't say that?

A. No. God is the only one who could answer that question, I'm afraid, but from our understanding in medicine, the man who is walking along hunting gets along all right; then he picks up his buck and he has his coronary. We assume that picking up the buck was his mistake. Possibly, going hunting was a mistake, too, but at least he was getting by.

Q. Your luck was as good as mine, apparently.

A. I stayed home.

Q. Doctor, in any event, if a thrombus formed during this [117] process of moving wheat sacks at any point along the line, it wasn't a complete closure thrombus, was it, at that time?

A. It never closes immediately, that's right, the thrombus builds. Your pain occurs as the thrombus starts, as a rule. The thing is just like putting a rubber band around your finger; the moment you put it on there it hurts; you leave it on, then the pain gets worse. It is the same thing.

Q. That's right, but the clot isn't entirely formed at that time, is it?

A. Oh, no, the clot, as far as being formed, it takes sometimes 48 hours to be formed completely. This was a soft clot even when found.

Q. And there may be additional events occur-

(Testimony of D. Wilson McKinlay.)

ring after the initial event which will cause the thrombus to build more rapidly?

A. Well, the pain itself is one of the chief things that does that. That is the reason we try to relieve it.

Q. Well, in any event now, getting back to my previous question, as you stated, the thrombus was formed as a result of the narrow, diseased condition of these arteries, precipitated, apparently, in your opinion, by exertion?

A. That's right. [118]

Q. However that exertion may have occurred?

A. That's right.

Q. So without the condition in the artery, the thrombus wouldn't have been there?

A. That's right.

Q. In your opinion, without the other, it wouldn't have been there, this new thrombus?

A. That's right.

Q. The underlying, basic factor in the situation was the artery's sclerotic condition?

A. That's right.

Q. That was, you might say, the primary cause of the forming of the thrombus?

A. That's right.

Q. If that is a correct word to use.

A. Well, it is the underlying cause.

Q. The underlying cause?

A. That's right.

Q. And the other is simply a contributing factor, that is, the exertion? A. That's right.

(Testimony of D. Wilson McKinlay.)

Q. Isn't that right?

A. That is what I would say.

Q. So that you can't say that the thrombus was the result solely of the exertion, can you? [119]

A. The thrombus was produced by exertion in a previously damaged heart, is what I said in the first place.

Q. In conjunction with the previously damaged coronary arteries, isn't that right?

A. Yes, I have stated that several times, Mr. Hamblen, that without the heart's arteries having been diseased, it would not have occurred. Of course, on the contrary, if the extra exertion had not occurred, the damaged arteries would have continued supplying the heart for normal activity.

Q. Yes, he might have lived, as you say, an indefinite period? A. That's right.

Q. Might have been hours?

A. Days, weeks, years.

Q. Days, weeks, or months?

A. I have one man who has been ten years now since he had a coronary.

Q. That all depends on the extent of the damage in there, doesn't it?

A. It depends on that and the progress of the disease, factors we don't know about, even maybe cigarettes.

Mr. Hamblen: I think that is all.

The Court: Any other questions?

Mr. Raftis: No further questions. [120]

(Testimony of D. Wilson McKinlay.)

The Court: That is all, then. The doctor may be excused, then?

Mr. Raftis: I think he is going to wait just a few moments.

The Court: Yes.

Mr. Raftis: The other doctor's deposition has to be read yet, I wanted the doctor to hear it.

The Court: I see, all right. You can sit right here, if you like.

(Witness excused.)

Mr. Raftis: I just have one short witness. Mrs. Noah, will you come forward, please?

LIZZIE NOAH

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Raftis): Will you state your name, please, for the record?

A. Mrs. Lizzie Noah.

Q. And where do you live, Mrs. Noah?

A. In Colville.

Q. And what relationship do you bear to Ralph H. Garett, now deceased?

A. His mother. [121]

Q. And I will ask you if on September 24, 1953, you had occasion to be at the home of Mr. and Mrs. Ralph H. Garett? A. Yes, sir.

Q. Where is that home situated?

A. How?

(Testimony of Lizzie Noah.)

Q. Where is their home? Where was their home then?

A. Well, it is about nine miles—I don't know just which direction, I can't say, but it is nine miles out of Colville.

Q. Yes. What type of home is it?

A. Well, it is a nice house.

Q. That is a farm home?

A. Yes, just a nice farm home.

Q. And were you there when Mr. Garett came home from Colville on the 24th of September, 1953?

A. Yes, sir.

Q. And will you tell the Court what he brought with him on that trip? A. Some wheat.

Q. And did you observe how it was loaded, in what kind of a conveyance?

A. Well, I can't just exactly say, but some of them was standing and some was lying down.

Q. Was it a truck? [122] A. Yes.

Q. That is what I wanted to know. Were you present at any time while Mr. Garett was unloading the wheat?

A. Well, I saw him through the window.

Q. And did you observe how he was doing it?

A. Yes, I did.

Q. Just describe, will you, to the Court what he did?

A. He was pulling them toward the end gate where it was opened and——

Q. Who was helping him?

A. His son.

(Testimony of Lizzie Noah.)

Q. And did you observe Mr. Garett, your son, lifting any wheat sacks off?

A. Well, they were pulling it out of the wagon.

Q. Just pulling it? A. Yes.

Q. And while he was engaged in that work, did you notice anything unusual occur?

A. Yes, I seen him lean over and then all of a sudden he straightened up and put his hand in his stomach, and that made me say to his wife, "We better help unload the wheat."

Q. Did you go out then?

A. And we did.

Q. And then will you describe what condition you found [123] your son in when you went out there?

A. Well, he was leaning up against the truck and unable to do any more.

Q. Did you observe his color?

A. Yes, it was kind of pale looking. He was real pale.

Q. And did he do any further work after you observed him?

A. He did not. He wasn't able.

Q. Did he go to the house?

A. Yes, he did, he went to the house.

Q. And did you observe whether he had his meal that evening?

A. Not that I know of, he didn't to home.

Q. He didn't have anything there?

A. He didn't care for any.

Q. Did that condition of pain and distress con-

(Testimony of Lizzie Noah.)

tinue until he left? A. Yes, it did.

Q. And were you there when he and his wife left? A. Yes, sir, I was.

Q. Where did they go?

A. Well, they went to Spokane.

Q. What did they drive, what vehicle?

A. They drove the truck.

Q. Do you recall who was driving?

A. She did. [124]

Q. That is, Mrs. Garett? A. Yes, sir.

Mr. Raftis: I believe that is all.

Cross Examination

Q. (By Mr. Hamblen): Mrs. Noah, when you looked out the window and saw your son put his hand on his stomach, you thought there was something wrong with him, did you?

A. Yes, I did, I realized there was.

Q. You knew he had been in ill health, did you?

A. No, I hadn't known it, hadn't nobody told me anything about it. That was news to me.

Q. I see.

Mr. Hamblen: That is all.

Mr. Raftis: That is all, Mrs. Noah.

(Witness excused.)

That is our case, your Honor.

(Plaintiff Rests.)

Mr. Hamblen: If the Court please, may we reserve our motion until the close of the case?

The Court: Yes, I think that would be a wise thing to do. [125]

Mr. Hamblen: Save a little time.

Then I would like first, in presenting defendant's case, to have published the deposition of Dr. Lowell.

The Court: All right. Are you willing to stipulate that this deposition be read?

Mr. Raftis: Yes.

The Court: I don't believe it quite meets the requirements. Colville isn't 100 miles from Spokane, is it? How far is it from here to Colville?

Mr. Raftis: It is 80 miles.

Mr. Hamblen: It was taken under stipulation which is attached to the deposition, your Honor.

The Court: I am not questioning the regularity of taking it, but Rule 26 of the Rules of Civil Procedure provides that, unless it is a deposition of a party, it may not be used unless the witness is dead or more than 100 miles from the place of trial, unless you gentlemen stipulate. If you wish to stipulate, of course, that may be done.

Mr. Hamblen: Well, I understood we had so stipulated.

Mr. Raftis: Well, I might say Dr. Lowell remonstrated about leaving his work and coming here, and I told Mr. Hamblen it would be agreeable to take his deposition.

The Court: Oh, I haven't the slightest objection to [126] it; I just want to raise the point and be sure you know what you are doing here.

Mr. Raftis: Yes, I wouldn't want to take advantage of the rule.

The Court: No, I have no objection at all.

The record may show, then, that counsel has

stipulated that the deposition may be read and considered as part of the evidence in the case; is that right?

Mr. Hamblen: Yes, all right.

Mr. Raftis: That is all right with us, your Honor.

The Court: All right, go ahead.

Mr. Raftis: Is it agreeable with your Honor that I sit in the chair?

The Court: Yes, I think that is a good way of doing it.

(Whereupon, the said deposition was read into the record, Mr. Hamblen reading the question, Mr. Raftis the answers, as follows:)

Mr. Hamblen: The deposition shows that Dr. Roy S. Lowell was first duly sworn to tell the truth, the whole truth, and nothing but the truth, and testified as follows:

"Examination by Mr. Hamblen:

Q. Your name is Dr. Roy S. Lowell?

A. Yes, sir. [127]

Q. You reside in Colville, Washington?

A. That's right.

Q. Doctor, you knew Mr. Ralph H. Garett during his lifetime? A. Yes, sir.

Q. And I believe you treated him at various times, or at least saw him in your office professionally at various times from August, 1948, down to September, 1953? A. That's right.

Q. Would it be fair to say, Doctor, that you were his family physician? A. I think so.

(Deposition of Dr. Roy S. Lowell.)

Q. In that period of time, you treated him for various conditions, such as peptic ulcer, unguinal hernia, appendicitis, hepatitis, and a few other things? A. Yes.

Q. On September 5, 1953, do your records show that he called at your office in Colville?

A. Yes, sir.

Q. And at that time, did he complain that he thought there was something wrong with his heart?

"Mr. Raftis: Objected to as being incompetent, [128] irrelevant and immaterial."

And I won't press that at this time, your Honor.

The Court: All right.

"A. On the 31st day of August, he was in the office and he had complained of a chest pain because of the jaundice that he had. At that time, he also mentioned that he had had a little chest pain on exertion. No cardiogram was done at that time. He was given nitroglycerin.

Q. That was August, 1953?"

The Court: What is hepatitis? Is that jaundice?

Mr. Hamblen: Well, jaundice is associated with it. It is a kidney disease that goes along with jaundice, I believe.

I'm sorry.

The Court: Have you gentlemen any objection to my inquiring, just for my own information?

Mr. Hamblen: I said kidney, I meant liver.

Dr. McKinlay: Hepatitis is inflammation of the liver.

The Court: I see. All right, go ahead.

(Deposition of Dr. Roy S. Lowell.)

"A. That was the last of August, 31st.

Q. 1953? I just want to get the year.

A. Yes. [129]

Q. At that time, did you construe this chest discomfort as a heart condition?

A. I hadn't taken a cardiogram. I merely observed that he complained of pain on exertion, gave him some nitroglycerin, which more or less proves the presence or absence of angina, and told him to report back.

Q. Did he report back?

A. I don't think he said too much about his heart that day. We were concerned chiefly with his jaundice.

Q. Doctor, you asked him to come back in a few days?

A. He came back on the 5th of September.

Q. 1953? A. Yes, sir.

Q. What did he complain of at that time?

A. He stated that the nitroglycerin had relieved the pain somewhat. A cardiogram was taken and showed definite evidence of coronary artery disease. Acordingly, he was advised prolonged rest, absolute rest, and to sell his farm.

Q. In other words, on September 5, 1953, you did make a definite diagnosis of coronary artery [130] disease? A. Yes, sir.

Q. And instructed him to cease all work and to sell his farm? A. That's right.

Q. Did he come back again in September of that year?

(Deposition of Dr. Roy S. Lowell.)

A. He came back the next time on the 24th of September.

Q. And what was his complaint, if anything, at that time?

A. He was continuing to have pericardial chest pain on exertion. I believe he mentioned continuing to do some work around the farm. He felt that because he had some gas accompanying the pain, that it was his stomach that primarily was the cause of his pain and in his heart. He felt that way himself. I advised him that this was very unlikely, but because of the uncertainty in his own mind, which I wanted to get rid of, I advised him to have stomach x-rays to put his mind at rest in regard to his stomach. Since our radiologist was not to be back in Colville for a matter of about a week, he was sent to Spokane [131] for these x-rays.

Q. Do I understand that on September 24th, your prior diagnosis as to his heart condition was still the same?

A. Oh, yes, it didn't change.

Q. What time of day on the 24th?

A. I cannot tell you.

Q. You can't. That is the last you saw of him?

A. Yes, I believe so.

Mr. Hamblen: I think that's all.

Cross Examination

Q. (By Mr. Raftis): Dr. Lowell, the history of Mr. Garett which has been indicated reveals that he had considerable trouble with his stomach and the

(Deposition of Dr. Roy S. Lowell.)

region of his bowels for some years, does it not?

A. Mr. Garett had lots of complaints, believe me, some of which were borne out by examinations and some of which were not. Mr. Garett was definitely on the functional side, but in addition to having plenty of other troubles. I will have to go back to my records to see whether they actually show an ulcer. I don't think they did. I am not sure. In 1950, I have [132] here an ulcer history, but that doesn't mean he actually had an ulcer. It doesn't definitely indicate the presence of an ulcer; you have to see it on x-ray.

Q. Did he complain of ulcer trouble?

A. He believed right along through the years that he had an ulcer.

Q. The records show that he was operated on for appendicitis. Do you recall when that was?

A. I would have to look it up. He has an extensive history. He had an inguinal hernia operation in December, 1948. I talked him out of having his appendix operated on many times. He was just functional enough, and we operate and find a nice quiet appendix, well, we don't like to do unnecessary surgery.

Q. My point was, he did make considerable complaint about stomach functional disorder?

A. Yes, he did. Very much so.

Q. According to your records, the first indication of positive heart trouble was in September, 1953, as I recall?

A. I believe we took out the appendix when I

(Deposition of Dr. Roy S. Lowell.)

fixed his hernia. We thought we probably wouldn't find much in the way of appendix, [133] and I think we took out the appendix as an adjunct to the hernia. I have no entry for the appendix, so it must have been done at that time. It is a long time ago.

Q. Does your record show any evidence of heart condition prior to August, 1953?

A. No.

Q. And did it show considerable functional disorder of the general stomach area, such as you have indicated—hernia, appendix, ulcer?

A. We never proved an ulcer at any time.

Q. I mean complaints of it?

A. That was his general complaint. He complained of a certain amount of pain in the upper stomach area, gas.

Q. Would that be associated generally with hernia or an ulcer or stomach trouble, this gas condition? A. It could or could not.

Q. It wouldn't be uncommon to be associated with them?

A. Well, typically, gas is not often a complaint registered by people with ulcers, typically. As you know, people can complain of most any kind of a symptom with any disease, but [134] typically gas is not usually too common with an ulcer.

Q. As far as Mr. Garett is concerned, in his own mind he, at least, felt, and so told you, that he thought he had a stomach condition?

A. That's right.

Q. That is the reason you advised him to go to

(Deposition of Dr. Roy S. Lowell.)

Spokane to see a specialist and to determine what, if any, condition existed as to his stomach?

A. That's right.

Q. Do you recall who he was to see?

A. He was to see Dr. Galloway.

Q. There is no recollection on your part when Mr. Garett came on September 25th before he went to Spokane?

A. There is nothing on the card.

Q. You have no recollection that he did?

A. No. I do recall that his wife came to see me. I couldn't tell you the date it was. She was quite perturbed that Ralph had not done as I instructed him to do, and wondered what she could do about it. I can't tell you the date, I haven't it written down.

Q. Did you definitely determine the type of [135] coronary artery condition that you mentioned awhile ago?

A. It is a coronary heart disease.

Q. That, I take it, is damage or deterioration of the artery leading into the heart, is that correct?

A. No.

Q. I am not a medical man, please define it a little more.

A. It is a cutting off of the circulation of one of the arteries that nourish the heart muscle.

Q. Would that be sometimes called coronary deficiency?

A. A coronary insufficiency is where the coronary muscle is not receiving an adequate amount of

(Deposition of Dr. Roy S. Lowell.)

blood supply, but it is not an occlusion. Any time the blood supply in the coronary vessel is not adequate, you cannot call it an insufficiency. Coronary insufficiency is a broad term.

Q. One other question, Doctor. Assuming that the evidence shows that on September 25, 1953, Ralph H. Garett was unloading sacks of wheat at his farm on the evening of that day, and that these sacks weighed approximately 140 pounds each; assuming further that while engaged in loading these sacks of wheat he exerted himself rather severely and immediately thereafter severe pain developed in his chest which persisted and he died the following morning on his way to Spokane——

A. I believe he was in Spokane at the time.

Q. ——in your opinion would this heart seizure and resultant death probably have been caused by the strain which he suffered in unloading this wheat?

A. I think you could say it could have aggravated his present existing condition. You couldn't definitely say it caused his death, no. It would have aggravated it, no doubt, yes. We have had these heart cases from time to time, and one of the things that you prescribe to your patient is not to exert himself unduly.

Q. Why do you do that?

A. For example, when you have coronary artery disease, and go to a football or athletic event and he dies, and the excitement of the athletic event you might say is a factor in his death. That happens

(Deposition of Dr. Roy S. Lowell.)

quite often. Whether you could say that this man —you could just [137] as logically say that the excitement of going to Spokane on the trip led to his demise as you may say that the loading of the wheat sacks caused it. I think as far as you can go is to say that it contributed partly to his death. I don't think you could definitely say that is what did it.

Q. You could say there would be a causal connection between that and his death?

A. Possibly.

Q. Would you say probably?

A. I would say possibly.

Q. Do you know how much Mr. Garett weighed?

A. Oh, I imagine—I don't know what his weight was, but I would recall it would be around 130 to 135. That would be as near as I could guess.

Q. There is some testimony that it is considerably less.

A. It might have been. I can't say definitely.

Q. The point I am making is he was unloading wheat sacks weighing 140 pounds, which were in excess of his own weight. Assuming that one of these sacks of wheat got away from him and he grabbed it and pulled it back to prevent it [138] falling off the truck, and immediately thereafter had to stop his work and suffered a severe pain in his chest, would you say that that pain was probably caused by that sudden exertion and strain?

A. Yes.

Q. And if that pain persisted from then on until

(Deposition of Dr. Roy S. Lowell.)

he died the following morning, would one say that it was a causal connection between that event and his death and that it probably brought on his death?

A. I couldn't say that, because he had had lots of pain for the last three weeks before that. He had many attacks of pain. Any exertion would bring on the pain, so, as I say again, I can't say it was that particular event or any other particular event that actually did it. It certainly contributed to it, but——

Q. Assuming the record shows no other event which would bring on any noticeable pain, would you still answer the same?

A. He came in to see me with pain, any time he exerted at all, walking up stairs, lifting wheat sacks, or going to Spokane. If you are going—which you probably can't do—but [139] if you are going to try to get definitely what brought it out, well, the trip to Spokane immediately preceding his death could have caused it; you could almost say it might have been. Or you can say the lifting of the wheat sacks certainly didn't help his condition any, and undoubtedly was a contributing factor, but you cannot say definitely that it was the lifting of the sacks that caused his death. I don't think you can, because if that were the case, why didn't he die the night before?

Q. Well, do heart patients always die immediately upon suffering a severe heart injury?

A. It all depends on what caused the death. A man has a coronary thrombosis and he gets over

(Deposition of Dr. Roy S. Lowell.)

the initial attack of pain and stays in the hospital for some time and is sent home, and because of that heart attack, he throws a blood clot off to his lungs and immediately dies. That is a different cause of death than from the coronary itself. That happens quite often.

Q. No postmortem was done, was it?

A. Not that I know of. So we cannot definitely say that he died of the coronary. We can say [140] that he died indirectly from the effects of the coronary, but the immediate cause of death is undetermined. He might have died of a blood clot that his heart threw off to his lungs. We don't know.

Q. But you do know that he did this heavy lifting? A. Yes, we knew that he did that.

Q. And it brought on severe pain?

A. Yes. He died within 24 hours after that. This is not my statement——

Q. This is assumption?

A. This is assuming he lifted the wheat sacks. I can't tell you that. It is all assuming.

Q. Yes.

A. My impression was that he had been doing lots of it prior to this time that he shouldn't have been doing.

Q. He might have been lifting wheat sacks every day, but you don't know?

A. I don't know.

Mr. Raftis: That's all.

(Deposition of Dr. Roy S. Lowell.)

Redirect Examination

Q. (By Mr. Hamblen): As I understand it, Dr. Lowell, his wife also [141] knew that you had instructed Mr. Garett not to engage in any work?

A. Definitely.

Q. And apparently she was perturbed and during the month of September came into your office?

A. Yes. The date, I haven't any idea.

Q. It was prior to the last time that he came in?

A. Yes.

Q. And asked you whether there was some way you could help her in getting him to cease his heavy work? Is that the purpose of her visit, in general?

A. I think essentially, yes.

Q. She was generally perturbed?

A. Yes.

Q. As I understand it, Doctor, in answer to Mr. Raftis' questions, you are of the opinion, assuming the facts as he gave them to you, that the lifting of the wheat was not the cause of death? It may have aggravated his heart condition, but in your opinion it was not the cause of death, or, at least——

A. I couldn't state definitely. I can say I don't know. It certainly probably contributed [142] to it. Whether it was the definite cause of death or not, I don't know. It might have been caused by excitement.

Q. It might have been caused by any number of things? A. That's right.

(Deposition of Dr. Roy S. Lowell.)

Q. You do know from your examination of him in the latter part of August and in the early part of September, 1953, that he had a coronary heart condition? A. Yes.

Q. Let me ask you this, Doctor: Assuming that postmortem was done on Mr. Garett, and that the certificate of death showed under the medical certificate that the direct leading cause of death was coronary occlusion, and the antecedent causes were arteriosclerosis, assuming that is the medical certificate, would that fit in with your diagnosis as you saw him?

A. That is a clinical diagnosis.

Q. It is exactly the same thing? A. Oh, yes.

Q. On that basis, it would appear, Doctor, would it not, that the cause of death was the coronary condition as you have stated? [143]

A. I would say that it was either that directly or indirectly.

Q. Would that be a major factor?

A. Yes, that was the major factor. The fact that he could have thrown an embolus because of his coronary could have happened. Many people die that way.

Q. I think on your cross examination you used the word 'contributed.' There may have been other contributing factors, but the coronary condition was the major cause of death; wouldn't you say that?

A. Yes, sir.

Q. And if lifting wheat or any other strenuous exercise would, in fact, affect Mr. Garett adversely,

(Deposition of Dr. Roy S. Lowell.)

isn't it a fact that such conduct on his part was contrary to your directions and instructions to him as his family physician?

Mr. Raftis: Objected to as immaterial, irrelevant and incompetent.

A. Yes, sir. He did those thing contrary to my advice.

Q. Contrary to your advice?

A. Yes. [144]

Q. Isn't it a fact that your advice in that respect was based on the fact that his heart disease, as you found it, would not permit him to do those things with safety? A. That's right.

Recross Examination

Q. (By Mr. Raftis): In other words, the reason you advised him not to lift is because you felt that it would result in fatal consequences?

A. That's right.

Q. Did you examine or see Mr. Garett after his death? A. No, sir.

Q. Did you make up the death certificate?

A. I don't think so because he was taken care of by some doctor in Spokane.

Q. So you have no way of knowing what the actual conditions were that brought about his immediate death? A. No, I haven't.

Mr. Raftis: That is all."

Mr. Hamblen: Defendant rests, your Honor.

(Defendant Rests.) [145]

Mr. Raftis: May I have just a minute to talk to Dr. McKinlay?

The Court: Yes, you may do that. I will take a recess for ten minutes.

Mr. Hamblen: If the Court please, excuse me, I had a memorandum of authorities ran out during the noon hour.

The Court: Yes, all right, if you will hand a copy to counsel.

Mr. Hamblen: I will hand counsel a copy here.

The Court: I will look at it.

Mr. Hamblen: It might be helpful preceding the argument.

The Court: Let me know when you are ready.

(Whereupon, a short recess was taken.)

Mr. Raftis: Will you take the stand, Doctor?

D. WILSON McKINLAY

recalled as a witness in rebuttal, having been previously sworn, testified further as follows:

Direct Examination

Q. (By Mr. Raftis): Dr. McKinlay, you have previously testified on direct examination. I will ask you if you were present and heard read in open court the deposition of Dr. Roy S. [146] Lowell?

A. Yes, I did.

Q. Dr. McKinlay, I will call your attention to the testimony of Dr. Lowell on Page 2 thereof, in answer to a question of what did he complain of at the time, and he made this answer:

"He stated that the nitroglycerin had relieved the

(Testimony of D. Wilson McKinlay.)

pain somewhat. A cardiogram was taken and showed definite evidence of coronary artery disease."

I will ask you to state, in your opinion, Doctor, would it be possible to determine the presence and extent of coronary artery disease through a cardiogram only? A. No, sir.

Q. Will you explain your answer?

A. An electrocardiogram is a tracing produced by infinitesimal currents of electricity generated by the heart muscle as it contracts, which is transmitted through delicate instruments and transcribed on a moving tape, and all that can be read from an electrocardiogram is the condition of the heart muscle, indicating whether or not there has been damage to the heart muscle in the past at any time prior to the tracing.

Unfortunately, there is no way known, by [147] electrocardiogram or other means, of determining the condition of a man's coronaries before he has a coronary attack or before death. I wish we had it. I would like to know the condition of mine.

Q. Did you have occasion, Dr. McKinlay, to call Dr. Lowell after the death of Mr. Garett?

A. Yes, I did, made it my business to do so immediately after his death.

Q. And did you report the fact of Mr. Garett's death? A. Yes, I did.

Q. And will you relate to the Court the remark or answer that Dr. Lowell made at the time you called him with respect to his death?

Mr. Hamblen: Just a minute.

(Testimony of D. Wilson McKinlay.)

The Court: Just a moment.

Mr. Hamblen: I would like to object to that as hearsay.

Mr. Raftis: Well, he was talking to Dr. Lowell. This is by way of rebuttal to the doctor's statement that he definitely knew——

The Court: I doubt that it would be admissible unless a foundation has been laid for it by way of impeachment, and of course, that can't be done here because the the other doctor is testifying by deposition.

Mr. Raftis: Yes, we had no opportunity to [148] anticipate that.

The Court: Yes, I understand that, but I think perhaps I should sustain the objection. You do object, I understand?

Mr. Hamblen: Yes, I do, your Honor.

The Court: Under the circumstances here.

Mr. Raftis: I see. We are up against it, we can't control that, your Honor.

Q. Dr. McKinlay, Dr. Lowell has stated generally that he—if I can find his answer here.

Question, on Page 10:

"As I understand it, Doctor, in answer to Mr. Raftis' questions, you are of the opinion, assuming the facts as he gave them to you, that the lifting of the wheat was not the cause of death. It may have aggravated his heart condition, but in your opinion it was not the cause of death?"

And he answered:

"I couldn't state definitely. I can say I don't

(Testimony of D. Wilson McKinlay.)

know. It certainly probably contributed to it. Whether it was the definite cause of death or not, I don't know. It might have been caused by excitement."

I will ask you, Doctor, in your opinion, from the [149] history of this case, if you think, assuming the facts are all true as you now have them, that the death of Ralph H. Garett was in any way caused by excitement?

A. I haven't heard anything testified to that would indicate there was any excitement.

Q. And based on the history of the case?

A. Based on the history.

Q. I will ask you one other question. In the light of the history of the case and the testimony of Dr. Lowell, the testimony of Ralph Garett, Jr., I will ask you if, in your opinion, the death of Ralph H. Garett was caused exclusively and solely by the exertion suffered by him on September 24, 1953?

Mr. Hamblen: Objected to as repetition. We have gone all through that on direct.

Mr. Raftis: I don't believe I asked that question.

The Court: Well, I will overrule the objection; he may answer it. I am not sure whether it has been covered.

Mr. Raftis: I'm not sure, but I want to be sure that it is asked.

A. I think that the accident or the strain of the exertion certainly precipitated the chain of events that produced his death.

(Testimony of D. Wilson McKinlay.)

Q. And, in your opinion, was that the sole and exclusive cause that did precipitate it? [150]

A. So far as I have heard, I would say that that was the sole precipitating factor that led to the chain of events we have described before that caused his death.

Mr. Raftis: That is all.

Cross Examination

Q. (By Mr. Hamblen): But, Doctor, you also testified previously that it wasn't the sole cause of his death, didn't you?

A. Mr. Hamblen—I can think of some other ways of stating this.

I told you in answer to your questions, I have answered Mr. Raftis, that this man had a chance to live beyond that period of time according to the condition of his heart, but he didn't live beyond that time. Therefore, from a medical standpoint, we would have to say that the trauma that produced that blood clot produced his death.

Now, the other factors in regard to the underlying causes, the defects in the arteries, I assume, made him a heart cripple.

Q. You aren't reversing your previous testimony? A. Not in the least.

Q. The narrow condition of the artery caused the thrombus, are you? [151]

A. I didn't say that that caused the thrombus, sir; I said that the fact that we had a crippled heart—I will put it in different words, maybe, and

(Testimony of D. Wilson McKinlay.)

not so medical—a cripped heart that could only stand a certain amount of strain, and when it had an unusual strain placed upon it, it couldn't carry that amount. Therefore, it produced the anoxia sufficient to produce the thrombus.

Q. And didn't you——

A. In the statement here from Dr. Lowell, he said that the man did have some relief from the nitroglycerin, right? indicating that he did have some anginal type of pain preceding this, which would mean that with slight exertion beyond what his heart muscle liked, he would have a kick-back with some pain. Then he would stop exerting himself or swallow nitroglycerin pill, and the pain would subside because the heart muscle was not deprived of oxygen sufficiently to produce damage such as a thrombus.

Q. All right. Well, now, I am going to ask you, although it is repetition, if you didn't testify that the two operated in conjunction? That is the word I used on my cross examination of you.

A. I stated that before.

Q. The narrow condition of the coronary artery and the [152] exertion operated in conjunction with each other to create this thrombus? Did you not so testify?

A. Yes, I did, and I am not changing that testimony. I am merely stating that with a damaged heart, the strain was sufficient to produce the thrombus. The narrowing of the artery had nothing to do with producing the thrombus, sir. If I

(Testimony of D. Wilson McKinlay.)

said that, then I certainly misspoke or misunderstood your question. The thrombus was produced by the need for an unusual amount of oxygen in the cardiac muscle. It couldn't get through in sufficient quantity. Therefore, the thrombus was formed because of this anoxia. The narrowed blood vessel did not have anything to do with producing the thrombus.

Q. Well, the thrombus would not have been produced without a narrow blood vessel, though, would it?

A. Well, I would like to put it this way, since you are trying to pin me down:

Suppose you take a normal heart and you subject that normal heart to a sufficient extreme violent effort, you can have heart failure. In London they had a good many of them during the war, some from fear, some from other exertion.

Q. Now I think we understand each other. I used one other word in my cross examination of you, I asked you [153] whether or not the artery's sclerotic condition, the narrow artery, was not the fundamental or primary cause of this man's death and, if I do not remember incorrectly, you answered "yes?"

A. From a medical standpoint, if he had not a coronary, arteriosclerosis, the amount of exertion that he had certainly would not have produced his death.

Mr. Hamblen: That is all.

Mr. Raftis: That is all, Doctor.

The Witness: That is quite a grilling.

(Witness excused.)

Mr. Raftis: I would like to call Mrs. Walsh.

The Court: May the doctor be excused now, Mr. Raftis?

Mr. Raftis: Yes, your Honor.

The Court: If there is no objection.

Mr. Hamblen: Yes.

The Court: We will let Dr. McKinlay go back to his office.

NOVA GARETT WALSH

plaintiff herein, resumed the stand in rebuttal, testified further as follows: [154]

Direct Examination

Q. (By Mr. Raftis): Mrs. Walsh, you have been previously sworn? A. Right.

Q. And you have heard the deposition of Dr. Lowell which was read before the Court?

A. Right.

Q. In this deposition, on Page 2, Dr. Lowell stated in answer to a question:

"On the 31st day of August he was in the office and he had complained of a chest pain because of the jaundice that he had."

You heard that testimony?

A. Yes, I heard that.

Q. I will ask you to state, Mrs. Walsh, if your husband, Ralph H. Garett, ever suffered from jaundice?

(Testimony of Nova Garett Walsh.)

A. My husband, Ralph H. Garett, never suffered from jaundice.

Q. Did any other member of your family suffer from jaundice?

A. It seemed that he was confused in his treatment there. His cards in his office have the son and my treatment and had his, and it was my son who had the yellow jaundice.

Q. His name was the same as your husband's?

A. But he listed him as "Garett boy," but somehow he was confused and started treating them both for jaundice, [155] I guess, for sometime.

The Court: Was that your son and not Mr. Garett?

A. That was my son who had the jaundice.

The Court: Oh, you mean the one who testified?

A. Right.

Q. (By Mr. Raftis): But your husband never had had jaundice? A. Yes.

Q. I believe you said, Mrs. Walsh, that the only time you were in the office after this heart condition came up was the time he took the cardiogram on September 5, 1953?

A. That's right, I think that is the last time I was in.

Q. Was your husband complaining of chest pain at that particular visit?

A. No, abdominal.

The Court: I didn't get that last question.

(The question and answer were read.)

(Testimony of Nova Garett Walsh.)

Q. (By Mr. Raftis): On Page 9, Mr. Hamblen asked Dr. Lowell:

"Q. As I understand it, Dr. Lowell, his wife also knew that you had instructed Mr. Garett not to engage in any work?

"A. Definitely.

"Q. And apparently she was perturbed and [156] during the month of September came into your office?

"A. Yes. The date, I haven't any idea."

Now, outside of the date that you were there when the cardiogram was taken, did you ever go back to Dr. Lowell's office and discuss this condition prior to your husband's death?

A. Never did.

Q. When did you go back after the date of that cardiogram?

A. I went back to Dr. Lowell after my husband died.

Q. And did you then tell him what had happened?

A. I did. He knew it, he had been called by the doctor, Dr. McKinlay had called him.

May I tell you what he said?

Q. What did Dr. Lowell tell you then with reference to this condition?

Mr. Hamblen: Objected to for the same reason in connection with Dr. McKinlay's testimony. Hearsay.

Mr. Raftis: Well, of course, we are a little bit at a disadvantage here.

(Testimony of Nova Garett Walsh.)

The Court: Yes, I understand that.

Mr. Raftis: We have waived everything here to get a deposition to the Court, and now we are hamstrung, we can't refute it, apparently.

Mr. Hamblen: Well, now, Mr. Raftis, I want to be [157] fair. You were going to bring Dr. Lowell down here yourself, and we arranged to take his deposition up there for the convenience of him and everybody concerned.

The Court: I think I should sustain the objection here. I don't want to get error in this record.

Mr. Raftis: Well, that's right.

The Court: And I am afraid, unless a foundation for impeachment has been laid, it wouldn't come within any exception to the hearsay rule.

Mr. Raftis: It is just impossible to lay it.

The Court: She may testify in rebuttal to anything he said, so long as she doesn't bring in what the doctor said.

Mr. Raftis: That's right.

The Court: I mean, to rebut anything that the doctor testified.

The Witness: Your Honor, there is a few questions in there that aren't right.

The Court: Well, your counsel can ask you about them, if he has testified to anything of which you have knowledge which you want to deny.

Q. (By Mr. Raftis): You have testified, then, that you did not go back in to see Dr. Lowell until after your husband died? A. That is right.

Q. Now, Mrs. Walsh, Dr. Lowell in his depo-

(Testimony of Nova Garett Walsh.)

sition states that your husband was functional, I believe he called it, which I believe means more or less complaining, neurotic, imagining that he has trouble. I will ask you to state from 1948 up to 1953, practically the month of the death of your husband, Dr. Lowell actually treated your husband for some condition other than heart?

A. For everything but heart, I should add.

Q. Well, did he prescribe medicines?

A. Yes. I noticed in this deposition he stated he took nitroglycerin; he never did take one.

Q. Did your husband ever take nitroglycerin?

A. I took some, he prescribed some for me, but my husband never took any.

Q. Was he treating you for a heart condition?

A. He told me he was treating me for spasmodic gall bladder, which I was doubtful at the time, and after Ralph passed away I discovered nitroglycerin somehow was for heart condition, so I came down to McKinlay for a cardiogram on myself. I said to him, I said, "Dr. Lowell——"

Q. Well, we can't—— A. All right.

Q. But your testimony, then, is that he did not give your [159] husband nitroglycerin?

A. I think he prescribed him nitroglycerin. That is what made me think when he gave me nitroglycerin for gall bladder, he told me he was giving me nitroglycerin for spasmodic gall bladder, I hadn't been suffering a thing. But Ralph had never taken any, he never took any. On the way down, he took one. Didn't do him a bit of good, he took one.

(Testimony of Nova Garett Walsh.)

I insisted he take one of them six miles out. He prescribed——

The Court: Do you mean that was one of his or one of yours?

A. One of his. He prescribed him some pills, we didn't know what.

Q. (By Mr. Raftis): When was that that he prescribed them?

A. Oh, it must have been his last visit in there.

Q. Would that be September 24th, you mean?

A. Must have been, I don't remember for sure. All I know is in the statement he claimed that he had taken them and it seemed to helped him. He never had taken them, I am the one who took the nitroglycerin. I didn't know what I was taking until later.

Q. I see. A. I found out about it.

Q. I wanted to ask you another question about what other [160] medicines were prescribed for the stomach condition that your husband was complaining of?

A. Amfegel and milk and soft diet.

The Court: Did this same doctor prescribe that for him? Lowell? A. Yes.

Q. (By Mr. Raftis): And there was something about appendicitis and hernia?

A. I believe in that statement he said he took his appendix out when they took his hernia.

Q. Is that correct?

A. At the time he operated on him, he was supposed to have had one hernia. Lowell examined him,

(Testimony of Nova Garett Walsh.)

he said, "Ralph, upon examination of you, we find you had two hernias, one on each side, on the groin." And he supposedly took them both out and he did. It was hernia because there was hundreds of stitches on each side. You don't have that with appendix operation. Then, later, he took his appendix. I think he stated in there he took them at the same time. He didn't, he underwent two operations, the appendix came later.

The Court: I think he stated in the deposition that he did the hernia on one side and some other doctor did it on the other.

A. That is what he said. [161]

The Court: Am I right about that?

Mr. Raftis: I was trying to get that. These things are kind of hard to locate.

The Court: And that he did the appendectomy at the same time.

A. He stated that, but that is wrong.

Mr. Hamblen: He said he wasn't sure about the appendectomy, though.

The Court: Yes, that's right. He did, yes, that's right. He said he wasn't sure about that.

Mr. Raftis: I have it here.

The Court: Could have been at a different time.

Mr. Raftis: His answer was:

"I believe we took out the appendix when I fixed his hernia. We thought we probably wouldn't find much in the way of appendix, and I think we took out the appendix as an adjunct to the hernia."

I don't know whether I have covered everything,

(Testimony of Nova Garett Walsh.)

Mrs. Walsh. I didn't have an opportunity to consult with the witness on account of Dr. McKinlay, your Honor. Perhaps maybe I could if the Court will pardon me just a minute.

The Court: Yes, all right.

(Mr. Raftis conferred with the witness.)

Q. (By Mr. Raftis): One question, Mrs. Walsh, in regard to instructions of Dr. Lowell about doing heavy lifting. I don't believe we have gone into it. When did he first give these instructions to your husband, to your knowledge?

A. He first gave them in '48, I believe, after he repaired him for double hernia. He told him he would never be as strong and would never be able to do the lifting that he had in the past.

Q. And did you at any time between September 5, 1953, up to the time your husband died go into Dr. Lowell to complain that your husband was not following his directions?

A. I don't believe I ever did. I'm sure that is a mistake. I believe perhaps I complained he didn't follow his directions quite on this allergy, but he was seeding his wheat and he was to keep out of the dust, and it was almost impossible for him to completely stay out of the dust for allergy. I believe on the records he had one of the worst cases of allergy in their history.

Q. I believe you have stated that the appendix was removed at an entirely separate occasion from the removal of the hernia?

A. That's right. [163]

(Testimony of Nova Garett Walsh.)

Q. And to your knowledge, was it necessary that the appendix be removed at that time?

A. When Dr. Lowell took them out, he said to Ralph and myself, he said, "Well, I'm sure glad we took these out." He said, "When we got in there, we found they were absolutely plumb full of green feces." That was his words.

Q. I believe that is all you had in mind, is it?

A. Yes.

The Court: Just a moment.

Mr. Hamblen: Just a question or two.

Cross Examination

Q. (By Mr. Hamblen): Mrs. Walsh, it is a little hard to remember exactly when you were in Dr. Lowell's office in '53, isn't it?

A. Doctoring with Dr. Lowell myself, I entered his office many times for myself. He was my family doctor.

Q. Well—— A. My son's.

Q. Well, do you say that you weren't in his office in September of '53 except the one time that you went in with Mr. Garett on September 5th?

A. I was in with him on September 5th, I was in there again the 25th—not the 25th, perhaps the 26th, after [164] Ralph died. I was not there the 24th, as I have stated many times.

Q. The only time you were in there was the 5th of September?

A. Or there the very first part.

Q. With Mr. Garett?

(Testimony of Nova Garett Walsh.)

A. The day they run the cardiogram, if that means anything.

Q. And you didn't go any other time to ask for Dr. Lowell's help? A. I did not.

Q. On the ground that Mr. Garett wasn't following instructions? A. I did not.

Q. Now, do you remember at the time of your deposition testifying that you didn't go in with your husband on September 5th when these cardiograms were taken?

A. I told you I went in on the 5th.

Q. Well, I will refresh your recollection.

Mr. Hamblen: May I have the deposition of Mrs. Walsh?

On Page 11, Mr. Raftis.

Q. Do you recall this question and your answer? I will lead up to it so you will get the whole context, Mrs. Walsh. [165] A. Go ahead.

Q. (Reading):

"Q. Well, he thought he had heart trouble before, didn't he?"

Your answer:

"A. Well, he thought he may have stomach trouble. I'm sure he never guessed he had heart trouble.

Q. As a matter of fact, he went to the doctor on September 5th, Dr. Lowell, didn't he?

A. He did, I believe.

Q. Dr. Lowell had told him he had a heart involvement at that time?

(Testimony of Nova Garett Walsh.)

A. I wasn't with him. I don't know what he told him."

A. There must be some mistake. We asked for several corrections, that may be one I asked to be corrected.

Q. You don't remember whether you said that at that time or not?

A. I shouldn't have, if I did.

Q. At least now, you say you were with him on the 5th?

A. I was with him on the 5th. If that is the day he had the cardiogram, that is the last day I went in with him, when he had the cardiogram. I didn't exactly keep [166] track of dates, as I stated. I can't even tell you what day that was.

Q. All right. Well, I have asked you one set of questions about this visit of the 5th. You say you didn't testify that you were not with him, is that right, at the time this deposition was taken?

A. I state again that I was with him on the date they ran the cardiogram, but as far as the September 5th, September 10th, if they run the cardiogram September 10th, that is the day; if not, I wasn't there.

Q. All right, do you remember these questions and your answers:

"Q. Yes, I know, but that is all prior to this incident of September 24th. I am talking about the September 5th visit which he made to Dr. Lowell."

(Testimony of Nova Garett Walsh.)

Your answer:

"A. I don't remember whether it was September 5th or when it was, but he did make a visit.

Q. I am not trying to trick you on the date, but right about in there.

A. Sometime in there in September, Dr. Lowell —I always went with him before, but this time I didn't go. I can't tell [167] what he did tell him this day, because I don't know."

Do you remember making that answer?

A. I know this much, I didn't go with him September 24th.

Q. Well, but this question was about the first visit in September, around September 5th. Do you remember testifying definitely that you didn't go with him?

A. No, I wouldn't have did it had I understood your question thoroughly.

Q. Twice then you testified on deposition that you didn't go with him, and you say that was incorrect now?

A. I am not saying what day I went with him; I went with him the day he had the cardiogram. I am not sure if it was September 5th or when it was. If you have the date of the cardiogram, that is the date I went with him.

Mr. Hamblen: That is all.

Redirect Examination

Q. (By Mr. Raftis): Just a couple of questions, Mrs. Walsh. I think the evidence, Dr. Low-

(Testimony of Nova Garett Walsh.)

ell's statement, was your husband came in about the 31st of August, 1953, and then came back again on the 5th of September. Now, is it possible for you to recall, or did you recall at the time Mr. Hamblen [168] asked you those questions in the deposition, just what date were involved?

A. It could—may I have the question again, please?

(The question was read.)

A. If my husband went in August 31st, it was probably because of the allergy he had. Every time he got around the wheat, this allergy came out. They called it wheat allergy, that he was allergic to wheat. And if it was September 5th the cardiogram was run, I was with him.

Mr. Raftis: I believe that is all.

The Court: Is that all?

Mr. Hamblen: That is all.

The Court: That is all.

(Witness excused.)

Mr. Raftis: Nothing further, that will be all, then.

(Plaintiff rests.)

The Court: Are you ready to argue this case, then, gentlemen?

Mr. Raftis: Well, unless your Honor wants to hear argument, I have some cases here, I would prefer if I could submit a brief and let your Honor take it under advisement after we submit some briefs, if that would be agreeable to counsel. [169]

Mr. Hamblen: Well, anything is agreeable with me, whatever the Court wants.

Mr. Raftis: That would be a little easier for the Court. I don't like to pick up a bunch of books and start reading a lot of language that——

The Court: I think there is a question of law here that will depend upon the present position of the Supreme Court of this state. Of course, this is a diversity action and the substantive law that applies is the law of the State of Washington, and I assume that the Supreme Court has taken a definite enough position so it won't be necessary for us to go outside of the state here. It is primarily a question of deciding——

Mr. Raftis: I believe that's right, at least as I view it.

The Court: ——of deciding the effect of these cases. And I think that I was at least temporarily on the majority when we held in one case that pushing an automobile that brought on a heart attack was an accident. That was the Tacoma case. But the Court receded from that position later on, and I might say that the thing that I am interested in primarily in here, I think that if you had nothing except the dragging of these wheat sacks, you would come within that recent case that Mr. Hamblen cited here, Evans against Metropolitan Life Insurance Company, 26 Washington (2d), [170] 594, and then the later case in 38 Washington (2d), Johnson against Business Men's Assurance Company. You have here the added cirmumstance that the wheat sack started to fall over and

the deceased reached out and grabbed it and held it back, whether that is an accident or not.

I might say that while I am not inclined to preclude counsel from arguing the facts, if they care to do so, it appears to me that the basic essential facts here as to how this accident happened are disclosed, so far as the Court is concerned, in the testimony of the son here, Ralph Garett. I think that the boy was a dependable witness and, considering his age, a very careful, conservative witness. He wasn't inclined to be hauled and pulled around either way here, and I think he was telling the truth as best he could and as he remembers. So that basically, although I am not trying to preclude counsel from arguing the facts in their briefs, I would be inclined to adopt his testimony as to how the accident happened. The facts as to just what Dr. Lowell found and to what extent he warned the deceased about his condition aren't quite so clear cut, but I think what you had in mind was a brief, primarily.

Mr. Raftis: On the question of law, principally.

The Court: Yes.

Mr. Raftis: The Evans case that your Honor mentioned, that lays down the rule of where there is a [171] voluntary or willful or deliberate act, like pushing a car up a driveway, there was nothing about that which was accidental, but I think that same case recites, and that is the distinction, that had he slipped or stumbled, some unforeseen or unusual circumstance, then it would come within the rule. And I have a number of cases which set

that distinction forth and I would like to brief them for your Honor and give counsel a copy and send them in.

The Court: Well, I think you have a pretty fine line here between whether it was merely a voluntary action produced by the sack falling over, or whether it was an unforeseen contingency that might bring it within the accident class.

Mr. Raftis: It is one of those close cases.

Mr. Hamblen: I am prepared either to argue that now or later, whichever you prefer.

Mr. Raftis: I will do it now.

Mr. Hamblen: I agree with your Honor that that is the main point of the case. It is funny how we get led down the side streets here, medical and otherwise, it is interesting, but I think the main issue is that one.

The Court: Yes, I think it was perfectly clear from this medical testimony that we have here a man, as the doctor described it, who was a heart cripple, and assuming that the exertion was sufficient, the extraordinary [172] exertion in his case, to bring on death, it wouldn't have been sufficient in the case of a person of good health.

But, of course, that principle has been announced in the workmen's compensation cases, which, as Mr. Hamblen has pointed out, follow a different rule, but, nevertheless, even in insurance cases, these insurance companies are not insuring only people in perfect health.

Mr. Raftis: That's right.

Mr. Hamblen: That's right.

The Court: We have to assume that some of them are not as strong as others and have these underlying conditions.

I notice that in the Evans case—I don't know whether that is significant or not—but in the Evans case there is very strong language in that policy which expressly exempted the company from liability in case of accidental death that was contributed to in any way by an underlying disease or physical condition, impaired physical condition.

Mr. Raftis: I believe there is something in the policy that covers that.

The Court: In that policy there was specific language.

Mr. Raftis: I believe that's right.

The Court: That provided that the company would not [173] be liable if the accidental death was caused, in whole or in part, or materially contributed to.

Mr. Raftis: That's right.

The Court: Any pre-existing disease or underlying condition of physical deficiency or weakness.

Mr. Hamblen: There were three policies here, your Honor. One of them had that second clause you are just referring to, the other two didn't, and the Court considered both points in its distinction. Of course, it had a clause on the first two policies which was just like ours here; they had to find that there was no accidental means in order to avoid liability.

The Court: That language wasn't in the other policy?

Mr. Hamblen: That language wasn't in the other policy, nor was it in the Johnson policy in the Johnson case.

The Court: Well, I haven't re-examined the Evans case recently and that is probably true.

Mr. Hamblen: That is my recollection.

Mr. Raftis: Well, if it is agreeable to counsel, your Honor, I will get a brief down very shortly, and I can give you these citations that I have if your Honor would like to have them.

The Court: I think that it is a reasonable request to submit a written brief in a case of this kind, and if we [174] are to do that, I doubt if it would help much to have oral argument because I think you can cover the point here in a brief that doesn't need to be too elaborate.

Mr. Hamblen: I may wish to comment further on his authorities, your Honor. Although I have submitted a memorandum, I may want to add to it when I get his brief.

Mr. Raftis: That is quite agreeable with me, if it is with the Court.

The Court: Yes, I would assume so. I will keep this brief that you have submitted and then you may supplement it in answer to Mr. Raftis' brief, and a couple of weeks on a side be sufficient?

Mr. Raftis: I would think so, your Honor. I have to go to Olympia for the first of the week, but I will be back by the middle of the week. Then if I could have until about the 10th or 12th of November, along in there somewhere.

The Court: Let's see. Well, that is all right.

You have until the 10th and then Mr. Hamblen will have until the 24th.

Mr. Raftis: That will be satisfactory.

The Court: If you need a few days additional time, within reason, why, write me and I would be inclined to grant it.

Mr. Raftis: Thank you, your Honor. [175]

The Court: Court will adjourn, then, until October 26th at 10 a.m.

[Endorsed]: Filed April 26, 1955.

[Endorsed]: No. 14747. United States Court of Appeals for the Ninth Circuit. Commercial Travelers Insurance Company, a corporation, Appellant, vs. Nova Garett Walsh, individually and as Administratrix of the Estate of Ralph H. Garett, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: April 28, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14747

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, Appellant,

vs.

NOVA GARETT WALSH, individually and as administratrix of the Estate of Ralph H. Garett, deceased, Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes now the appellant and does hereby state that it intends to rely upon the following points on appeal:

1. The trial court erred in its conclusion of law No. 1 that the facts showed "an unusual, unexpected and unforeseen event" which "constituted an accident."

2. The trial court erred in its conclusion of law No. 2 that:

"The acute or sudden coronary attack suffered and sustained by the said Ralph H. Garett—amounted to an accident as contemplated and defined by the express terms of the policy of insurance—and that the death of said Ralph H. Garett resulted directly and exclusively of all other causes from bodily injury sustained solely through external, violent and accidental means. * * *"

3. The trial court erred in its conclusion of law No. 3 that plaintiff is entitled to judgment for $3750 and interest under the terms of said accident insurance policy.

4. The trial court erred in entering judgment for the plaintiff.

Dated at Spokane, Washington, this 30 day of April, 1955.

HAMBLEN, GILBERT & BROOKE
/s/ H. M. HAMBLEN,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 7, 1955. Paul P. O'Brien, Clerk.

No. 14747

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

COMMERCIAL TRAVELERS INSURANCE COMPANY,
a corporation, *Appellant,*

vs.

NOVA GARETT WALSH, individually and as
administratrix of the estate of
Ralph H. Garrett, deceased, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

OPENING BRIEF OF APPELLANT

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INDEX

	Page
Argument	9
Conclusion	19
Jurisdiction	2
Specification of Errors	8
Statement of Case	3
Table of Cases	ii

TABLE OF CASES

Page

Crowell v. Sunset Casualty Co.,
21 Wash. (2) 238, 150 Pac. (2) 728 ---------- 13

Evans v. Metropolitan Life Ins. Co.,
26 Wash. (2) 594, 174 Pac. (2) 961 ---------- 9

Hodges v. Mutual Benefit Association,
15 Wash. (2) 699, 131 Pac. (2) 937 ---------- 12

Johnson v. Business Men's Assurance Co.,
38 Wash. (2) 245, 228 Pac. (2) 760 ---------- 11, 12

No. 14747

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

COMMERCIAL TRAVELERS INSURANCE COMPANY, a corporation, *Appellant*,

vs.

NOVA GARETT WALSH, individually and as administratrix of the estate of Ralph H. Garrett, deceased, *Appellee*.

Appeal from the United States District Court for the Eastern District of Washington Northern Division

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OPENING BRIEF OF APPELLANT

JURISDICTION

Jurisdiction arises out of diversity of citizenship (28 U. S. Code 1332). Appellant is a corporation organized under the laws of the State of Utah and Appellee is a resident and citizen of the State of Washington. The amount in controversy exceeds $3,000.00, exclusive of interest and costs (Findings of Fact I, II and XII, R. 13, 19).

The action originally was filed in the Superior Court of the State of Washington in and for the County of Stevens and was thereafter removed by Petition, Notice and Removal Bond to the United States District Court for the Eastern District of Washington, Northern Division (R. 26) (28 U. S. Code 1441(a).

This appeal is taken from the final decision of the District Court under the provisions of 28 U. S. Code 1291, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The single question involved in this case is whether Appellee, representing the beneficiaries on an accident policy written by Appellant is entitled to recover on said policy by virtue of the death of said Ralph H. Garett occurring under the circumstances disclosed by the testimony in the case and summarized in the Findings of Fact of the trial court.

The policy in question (Plaintiff's Exhibit No. 1, R. 34-36) carries the heading in part: "Benefits for Loss of Life . . . by Accidental Means . . .," and the insuring clause specifically insured Ralph H. Garett for $3,750.00 against loss of life "resulting directly and exclusively of all other causes, from bodily injuries sustained during the life of this policy solely through external, violent and accidental means . . ." (Findings of Fact II, R. 14; Plaintiff's Exhibit No. 1, R. 34-35).

The facts leading up to Ralph H. Garett's death are very little in dispute and are summarized in the trial court's Findings of Facts, to which no exception has been taken on this appeal. In brief, they are as follows: Ralph H. Garett in September of 1953 was a heart cripple suffering from an advanced condition of arteriosclerosis of the coronary arteries. Autopsy disclosed that one of said arteries had been completely closed by a previous heart attack and two of the other

arteries had been narrowed to about one-third of their normal size (Findings of Fact X and XI, R. 18).

Mr. Garett had been advised by his family doctor to quit farming in 1951, and again in August of 1953 he had been advised to quit work and rest (Statement by Mrs. Garett, Defendant's Exhibit No. 2, R. 59-60).

On September 24, 1953, Mr. Garett, accompanied by his son, Ralph Garett, Jr., took his Chevrolet flat bed truck and drove from his farm to Colville, Washington, where he procured a load of seed wheat consisting of 43 separate sacks weighing approximately 140 pounds each. He drove back to his farm, backed the truck up to the front porch of a small cabin-type building, which was used for storage, and placed a 2'' x 8'' plank from the rear end of the truck across the front porch of the cabin to the cabin doorway. The cabin porch and floor were some three feet above the ground so that the plank actually was elevated only some eighteen inches to two feet above the surface of the porch floor. Mr. Garett and his son then proceeded to unload said wheat sacks by the following method: Mr. Garett would drag the sacks along the bed of the truck to the end of the plank, lift up one end, placing each sack upright at the end of the plank. The son, Ralph Garett, Jr., would then place his right arm around the sack and slide it along and down the plank in an upright position into the storage building. The son was fourteen and one-half (14½)

years of age, 5' 6'' tall and weighed 125 pounds (Findings of Fact IV, V and VI, R. 14-15).

After unloading about nine sacks of wheat in the foregoing manner, Mr. Garett proceeded with the tenth sack, dragged it to the end of the truck, stood it upright at the end of the plank, and his son, Ralph Garett, Jr., "took hold of said sack and had started to slide it down the plank described above, when said sack of wheat got out of control of the said Ralph Garett (Jr.) and started to fall over in an opposite direction from said plank. That Ralph H. Garett, now deceased, was standing a few feet from said sack of wheat last described, and, when he observed that his son was unable to hold said sack of wheat upright on said plank, the said Ralph H. Garett took one step forward, reached out and quickly or suddenly jerked or grabbed said sack of wheat with one hand, and with the other hand held onto the building into which the wheat was being loaded, and remained in this posture, holding the sack of wheat at about a 45 degree angle, until the said Ralph Garett went around said truck to the opposite side of said plank and assisted his father, the said Ralph H. Garett, in straightening up said sack of wheat" (Findings of Fact VII, R. 16).

After said sack of wheat was straightened up, the son moved the same into the building as with the previous sacks of wheat, and after returning found his father in a stooped position on the truck, holding his chest

and complaining of pain. The father was unable to continue the unloading process, and that night drove with his wife to Spokane, Washington, where he was immediately hospitalized by Dr. D. W. McKinlay and where, on September 25, 1953, he died. An autopsy showed the pre-existing heart condition above referred to, and also showed a fresh thrombus or blood clot plugging one of the arteries. It was the opinion of Dr. McKinlay that the new blood clot and resulting death were the result of the "additional exertion" involved in the incident with the tenth sack of wheat above described (Findings of Fact VII, VIII, IX, X and XI, R. 16-19).

The Certificate of Death signed by Dr. McKinlay showed under the medical certification, "I. Disease or Condition Directly Leading to Death (a) Coronary Occlusion; Antecedent Causes (b) Arteriosclerosis." The bracket in the Certificate of Death under Paragraph 21a. covering "Accident" is left blank (Plaintiff's Exhibit No. 3, R. 97).

One further fact found by the Court should have been referred to above: "That if said Ralph H. Garett had not reached out and held said sack of wheat, it would have merely fallen 18 inches to 2 feet to the porch floor of said building, from whence it could have been moved into the storage room" (Findings of Fact VII, R. 16).

From the foregoing Findings of Fact, the trial court drew the conclusions which Appellant challenges by this appeal, namely, the conclusion that the incident above described constituted an accident within the terms of the accident insurance policy entitling Plaintiff to recover the face amount thereof.

SPECIFICATION OF ERROR

1. The Court erred in concluding "that the falling of said sack of wheat from the plank, on which it was being unloaded by the said Ralph Garett, son of Ralph H. Garett, now deceased, followed by the taking hold of said falling sack of wheat by said Ralph H. Garett, in the manner above described, was an unusual, unexpected and unforeseen event, and the court finds that the same constituted an accident (Conclusions of Law I, R. 20).

2. The Court erred in concluding "that the acute or sudden coronary attack suffered and sustained by the said Ralph H. Garett, as hereinabove described, amounted to an accident as contemplated and defined by the express terms of the policy of insurance—and that the death of said Ralph H. Garett resulted directly and exclusively of all other causes, from bodily injury sustained solely through external, violent and accidental means . . ." (Conclusion of Law II, R. 20).

3. The Court erred in concluding that Appellee (Plaintiff) was entitled to judgment against Appellant (Defendant) for $3,750.00, and interest, under the terms of said accident insurance policy (Conclusion of Law III, R. 21).

4. The Court erred in entering judgment on the findings and conclusions in favor of Appellee and against Appellant (R. 22-23).

ARGUMENT

1. Decedent's death resulted from an intentional act, thereby barring recovery for accident under the Washington law.

The accident policy in this case insures against death "resulting directly and *exclusively* of all other causes, from bodily injury sustained during the life of this policy *solely* through external, violent and *accidental means* . . ." (Emphasis supplied).

We have underlined four of the words in the insuring clause above to point up the basis on which we believe recovery should be denied in this case. However, we shall refer to the last term "accidental means" first inasmuch as it appears to us that the authorities in the State of Washington are conclusive in holding that under this provision the death must not merely be unforeseen or unexpected but that the *means* by which death is caused must be accidental and that accident is never present when an intentional act is performed.

The leading case on this point is, we believe, *Evans v. Metropolitan Life Insurance Co.,* 26 Wash. (2d) 594; 174 Pac. (2d) 961. This was a six to two en banc decision in which the Washington Supreme Court rejected the line of cases holding that mere physical strain resulting unexpectedly in death is sufficient to establish a right of recovery on an accident policy. On

the contrary, the court held that where the physical strain or exertion was the result of an intentional or deliberate act that there was no "accidental means" on which recovery could be based. The facts in the Evans case disclose that Mr. Evans stalled his automobile on the way home from church and got out to push it in order to start the engine running again. He pushed it to the start of a steep grade and then started towards the door to get in when he collapsed. A post mortem revealed that the immediate cause of death was coronary thrombosis due to Arteriosclerosis. The doctor testified that heart strain produced by shoving the automobile caused the final thrombosis and that probably Mr. Evans would not have died at that time except for the over-exertion.

The court reviewed all of the prior cases as well as authorities from other jurisdictions and held there could be no recovery because the pushing of the automobile was a voluntary act and could not be classified as an accidental means. We quote from page 622 (Washington report) of the opinion:

> "In this case, the pushing of the automobile was the means by which the injury was caused, and there was nothing unforeseen, involuntary, or unexpected in the act in which the insured was engaged from the time he started his car by pushing his foot on the pavement until he collapsed. There was no stumbling, slipping, or falling in his movements. He engaged in pushing his automobile for his own convenience. He encountered no obstacle

in doing so. *He accomplished just what he intended to in the way he intended to, and in the free exercise of his choice.* No accident of any kind interefered with his movements, or for an instant relaxed his self-control. There was an unforeseen result of the insured's deliberate actions. The result of any action, however, cannot be considered in the determination of the question of whether there was an accident (Ephasis supplied).

"The conclusion we must reach from a consideration of all the cited cases is that accident is never present when a deliberate act is performed, unless some additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death."

The above rule as adopted in the *Evans* case was reaffirmed by the Supreme Court in *Johnson v. Business Men's Assurance Co.,* 38 Wash. (2d) 245; 228 Pac. (2d) 760. The insuring clause in this case was identical with that involved in the case at bar. It appeared that Johnson collapsed and died from a heart attack shortly after emerging from his burning home from which he had been hurriedly and strenuously moving furniture and personal belongings. There was evidence that in the process Johnson had inhaled a considerable amount of smoke and had done some heavy coughing. The trial court submitted the case to a jury which rendered a verdict for the plaintiff. This verdict was set aside on a motion for judgment n.o.v. and the Supreme Court on appeal affirmed the entry of judgment n.o.v. for defendant.

The court said:

> "The rule is now firmly established in this state that, in order to recover under a policy insuring against death or injury by accidental means, (1) it is not enough that the result was unusual, unexpected or unforeseen, but it must appear that the means were accidental; and (2) accident is never present when a deliberate act is performed, unless some *additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death. Evans v. Metropolitan Life Ins. Co.,* 26 Wn. (2d) 594, 174 P. (2d) 961; *McMahan v. Mutual Benefit Health & Accident Assn.,* 33 Wn. (2d) 415, 206 P. (2d) 292" (Emphasis supplied).

* * * *

> "It is therefore our opinion that the evidence provides no basis for a jury finding that death was caused by inhalation of smoke, or other deleterious effects of the fire, unrelated to Johnson's excitement and exhaustion due to his own activity and the whole tragic experience of witnessing the destruction of his home. It is to be remembered that the policy insured only against loss effected solely through accidental means 'resulting directly and independently of all other causes.'

> "It is the settled rule that death due to dilation of the heart, coronary occlusion or thrombosis, or other circulatory failure resulting from mere overexertion, independent of a slip, fall, or other unforeseen occurrence, does not give rise to liability under an accident insurance policy of this kind."

Two earlier cases to substantially the same effect are *Hodges v. Mutual Benefit Association,* 15 Wash. (2d)

699; 131 Pac. (2d) 937; and *Crowell v. Sunset Casualty Co.,* 21 Wash. (2d) 238; 150 Pac. (2d) 728. Both of these cases involved sudden and unexpected deaths from heart attacks brought on by strenuous and unusual exertion, but in both cases the exertion was voluntary and intentional on the part of the deceased. In the *Hodges* case it was a matter of strenuous dancing. In the *Crowell* case it was a matter of unusually strenuous work by an employee engaged as a steam engineer in a lumber mill.

2. There was no unusual, unexpected or unforeseen happening constituting an accident in this case.

Appellee contended at the trial that the force and effect of the decisions set forth above was avoided in the present case by reason of an unforeseen, unusual and unexpected event—namely, the over-balancing of the tenth wheat sack. Defendant submits, first of all, that this particular occurrence or happening as outlined in the testimony and as set forth in the court's Findings of Fact does not constitute an unforeseen, unusual and unexpected happening rising to the dignity of the term accident.

"The burden rests upon the plaintiff to show that the death of the insured occurred through accidental means. To justify a recovery upon such a policy as that here in question, the evidence introduced in support of the claimant must be substantial" (*Crowell v.*

Sunset Casualty Co., 21 Wash. (2d) 244; 150 Pac. (2d) 728). How then can it be said that the over-balancing of a 140 pound wheat sack placed on end on a small plank only eight inches wide is an unusual, unexpected or unforeseen event? The whole process of unloading was, so to speak, standard practice. Clearly the standing of wheat sacks on end requires balancing them. Clearly the possibility of a sack losing its balance is foreseeable and to be expected. To us it would appear that this is a matter of common knowledge and judicial notice.

The sack was not falling on the father or on the boy, nor would the sack itself have been damaged if it had been allowed to overbalance all the way. On the contrary, it would have dropped a mere 18 inches to 2 feet to the cabin porch floor.

We respectfully submit at the threshold that there is no substantial evidence of any unusual, unexpected or unforeseen occurrence. The whole unloading operation was a normal process. In fact the complaint of plaintiff shows that from the inception of this suit there was no contention of anything unusual or unexpected.

Complaint paragraph IV (R. 4) recites that:

> "... while engaged in his usual occupation as a farmer, was unloading a load of wheat upon his farm."

and Paragraph V (R. 5):

> ". . . such coronary occlusion was caused by no other means than the sudden strain due to the lifting by said Ralph H. Garett of heavy sacks of wheat . . ."

and Paragraph VI (R. 5):

> "That the injury sustained by the said Ralph H. Garett while engaged in lifting heavy sacks of wheat at his farm . . ."

Note that the complaint of plaintiff refers to sacks in the plural and treats the occurrence as a single course of events. Obviously, if considered as a single unified course of events there is nothing unusual, unexpected or unforeseen. But whether considered as a unified course of events or whether the incident of the tenth sack be segregated out, still we repeat it does violence to common knowledge as well as to the normal intelligence and know how of Mr. Garett, who had been a farmer for many years, to assert that the possible over-balancing of an upright sack of wheat standing on a narrow eight-inch plank was unforeseen, unexpected or unusual.

3. The occurrence did not by itself involve Mr. Garett in any event.

If we may assume for the sake of argument that the loss of balance of the tenth wheat sack was an unusual,

unexpected and unforeseen event, nevertheless, we submit as a matter of law under the *Evans* and *Johnson* decisions, it was not the type of occurrence, and the occurrence did not operate in a way, to support recovery under this accident policy. We believe that the sum and substance of the law in this state under the *Evans* and *Johnson* decisions is that the unusual occurrence must be something which happens *to the insured* or operates upon him without regard to his own act or volition.

However, when the unforeseen occurrence does not happen to the insured or operate upon the insured by itself, but is merely a collateral event, something which simply happens and which in turn leads or induces the insured voluntarily to do something on his own part, then the cases hold that the unexpected happening has not produced the result of injury or death, and accordingly there can be no recovery on the accident policy. For example, in the *Evans* case the stalling of the automobile was certainly an unexpected, unusual and unforeseen event. Nevertheless, it did not by itself operate upon the insured in any physical, bodily, external or any other way until he voluntarily got out and pushed the car out of the intersection. This was his choice. That is, upon the occurrence of the event he had the choice of either leaving the car where it was or attempting to push it. He chose to push it. This was a deliberate act on his part and, accordingly, in the

Evans case it was held there could be no recovery. Or, for example, in the *Johnson* case, surely the burning of the decedent's home was an unexpected, unforeseen and unusual event. Johnson reacted to the event as would anybody. Namely, he attempted to take as much of his furniture and belongings out of the house as he could. Nevertheless, this was a voluntary act on his part. It was a choice which he made and the court again held there could be no recovery.

We submit that the same conclusion is unavoidably indicated in the present Garett case. The tipping over of the wheat sack after it had been turned over by the father into the boy's control was not something that in itself happened to the father or operated upon the father. He had the choice immediately either to let the sack fall to the porch floor or to reach out and attempt to hold it. He chose the latter course. It is immaterial that this may have involved quick action on his part because it was still a voluntary and intentional action. Thus in the *Evans* case, the court says:

> "He accomplished just what he intended to, in the way he intended to and in the free exercise of his choice. No accident of any kind interfered with his movements or for an instant relaxed his self control. There was an unforeseen result of the insured's deliberate actions. The result of any action, however, cannot be considered in the determination of the question of whether there was an accident."

If decedent had permitted the sack to fall it would only have dropped down 18 inches to 2 feet on to the porch floor without in any way damaging the sack of wheat or injuring the boy or anyone else. At most it would have been slightly less convenient for the boy to drag the wheat sack into the cabin from the level of the porch floor, rather than down the slanting plank. In other words, there was no practical necessity for decedent to reach out and grab the wheat sack. Obviously it was an entirely voluntary or deliberate choice on his part. We submit that the present situation is much stronger for the appellant than in the *Johnson* case where the practical necessity for Johnson to save his household belongings from the fire almost dictated his choice.

CONCLUSION

We respectfully submit under the evidence and the Findings of Fact made by the trial court that there was no unusual, unexpected or unforeseen event and there was no accident—at least none which itself occurred to or operated upon the deceased, Ralph H. Garett; that the coronary occlusion brought on by overexertion was the result of decedent's own intentional act; that the law of the State of Washington does not support recovery on an accident policy such as that in this case under such circumstances.

We appreciate that the courts have gone a long way (and that they should go a long way) in construing policies of insurance liberally in favor of the insured; nevertheless, an accident policy which is written and paid for as such should not be converted by the courts into a life insurance policy. We believe that to permit recovery in this case would in effect be to disregard the express terms of the accident policy and to rewrite it into a life insurance policy. It is submitted that judgment should be reversed and the action dismissed.

Respectfully submitted,

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No. 14747

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

Commercial Travelers Insurance Company, a corporation, *Appellant,*

vs.

Nova Garett Walsh, individually and as administratrix of the estate of Ralph H. Garett, deceased, *Appellee.*

Appeal from the United States District Court for the Eastern District of Washington Northern Division

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ANSWER BRIEF OF APPELLEE

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INDEX

Page

Additional Statement of the Case 2

Argument 6

Conclusion 21

Further Washington Cases in Support of Judgment 13

TABLE OF CASES

Page

Carpenter v. Pacific Mutual Life Insurance Co., 145 Wash. 679; 261 Pac. 792 16

Crowell v. Sunset Casualty Co., 21 Wn. (2d) 238; 150 P. (2d) 728 ..... 10, 11, 13

Evans v. Metropolitan Life Insurance Co., 26 Wn. (2d) 594; 174 P. (2d) 961 ..... 6, 7, 12, 13, 16, 17

Fowles v. Sweeney, 41 Wn. (2d) 182; 248 P. (2d) 400 19

Graham v. Police and Firemens Insurance Association, 10 Wn. (2d) 288; 116 P. (2d) 352 ..... 14, 16

Hanley v. Accidental Life Insurance Co., 164 Wash. 320; 2 P. (2d) 636 17

Hemrich v. Aetna Life Insurance Co., 188 Wash. 652; 63 P. (2d) 432 18

Hill v. Great Northern Life Insurance Co., 186 Wash. 167; 57 P. (2d) 405 17

Hodges v. Mutual Benefit Association, 15 Wn. (2d) 699; 131 P. (2d) 937 10

Johnson v. Business Men's Assurance Co., 38 Wn. (2d) 245; 228 P. (2d) 760 ..... 9, 12

Kane v. Order of United Commercial Travelers, 3 Wn. (2d) 355; 100 P. (2d) 1036 18

Kearney v. Washington National Insurance Co., 184 Wash. 579; 52 P. (2d) 903 17

Pierce v. Pacific Mutual Life Insurance Company of California, 7 Wn. (2d) 151; 109 P. (2d) 322 18

York v. Gaasland Co., 41 Wn. (2d) 64, 247 P. (2d) 556 12

Zinn v. Equitable Life Insurance Co., 6 Wn. (2d) 379; 107 P. (2d) 921 13

No. 14747

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

Commercial Travelers Insurance Company,
a corporation, *Appellant,*

vs.

Nova Garett Walsh, individually and as
administratrix of the estate of
Ralph H. Garett, deceased, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

ANSWER BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

As the facts herein are important, and the statement of the case by appellant is quite limited, appellee believes that a more complete statement will be of assistance to the court.

Ralph H. Garett, at the time of his death, was 42 years of age, and weighed about 123 pounds (R. 32). Since about 1948 he suffered and complained about a stomach disorder. In 1948 he had been operated upon for double hernia and had his appendix removed. Later he suffered from what his doctor called "wheat allergy." (R. 38). He suffered severely from his stomach complaint, losing sleep, vomiting, and at times he was unable to eat. He was being treated by his doctor for peptic ulcer, hepatitis and other ailments. (R. 39, 126). He was suffering considerably from allergy just prior to his death. (R. 38).

The first time there was any definite suggestion of a heart condition was in late August and early September, 1953, the month in which he died. (R. 39, 131). On September 24, 1953, the day before he died, he had come to Colville, played cards most of the day, and "felt fine" (R. 40, 41). At the time he called on his doctor in Colville, who had given him some nitroglycerin in August, and had taken a cardiogram on September 5, 1953

(R. 128). Mr. Garett still complained about his stomach and believed this was the source of his trouble. His doctor then advised him to go to Spokane to have a Dr. Galloway take x-rays of his stomach (R. 129, 131, 132).

Dr. D. Wilson McKinlay, who attended Ralph H. Garett at the time he died, testified it would not be possible to determine the presence and extent of coronary artery disease by means only of a cardiogram (R. 141).

After Mr. Garett had unloaded part of a load of seed wheat at his farm on September 24, 1953, he suffered a coronary thrombosis because of an independent, additional, unexpected, unforeseen and sudden occurence, more fully explained hereafter. He went to Spokane that evening, still believing it was his stomach trouble, to have the x-rays taken. (R. 48, 92, 93). He was promptly treated for both stomach and heart condition, although Dr. McKinlay was satisfied it was his heart. The severe pain persisted, and Mr. Garett died at 11.20 a. m. on September 25, 1953 (R. 94, 95, 96).

An autopsy was thereafter performed. According to Dr. McKinlay, (R. 100).

> "The autopsy showed an advanced condition of arterioscleriosis of the coronary arteries, known non-technically as arterioscleriosis, with marked narrowing of the lumens of two of the arteries and complete closure of one, with some scar tissue of the muscle area supplied by that particular artery, indicating an old infarct (scar)."

"It showed a marked narrowing of the anterior circumflex descending artery, with a fresh thrombus plugging it, and with the muscle supplied by that particular artery hemorrhagic and, under microscopic examination, already undergoing necrosis, verifying the fact that he had an acute coronary attack very recently.

"Q. This last condition you have described, the acute condition, was that the direct cause of the death of Ralph H. Garett, in your opinion?

"A. Yes, sir."

Dr. McKinlay testified that the blood supply to the heart of Ralph H. Garett was sufficient for ordinary exertion, sufficient to drag the wheat sacks along the truck at a steady pace (R. 115).

" . . . but when he made this extra exertion of supporting his own weight by leaning across the distance from the truck to the house and supporting partially the weight of the sack, and immediately after had the pain; it would be reasonable to assume that the amount of blood needed for the heart to take care of the extra exertion above what he had been doing would have been sufficient to produce an anoxia of the heart muscle which in turn sets up the chemical changes that produce a thrombus, and the thrombus itself then acts as a cork or a plug, stopping all blood from going through" (R. 103, 104).

According to Dr. McKinlay, immediate pain would follow the blood clot, and that this occured while Ralph H. Garett was in the awkward and strained position above related (R. 104), and that there was sufficient extra

strain to produce the acute coronary occlusion (R. 108), which in turn produced his death (R. 109). That, if he had not suffered this occlusion, he would have lived an indefinite period of time (R. 110).

Dr. McKinlay stated that the facts of the accident were not filled in on the death certificate because he had no information as to the accident when the certificate was prepared (R. 112). He further stated there would be a tremendous amount of added exertion required "to suddenly reach out supporting myself on the side of the house and grabbing a sack and holding it in an awkward, strained position, would cause a great deal more effort than slowly to lift a wheat sack up" (R. 116).

Other pertinent facts are embodied in the Findings of Fact, which are not excepted to by appellant, and, therefore, are to be accepted as true.

ARGUMENT

1. Did decedent's death result from an intentional act, thereby barring recovery for an accident under the Washington law?

Under this heading, on page 9 of its brief, appellant bases its principal contention upon the assertion that death by accidental means "must not merely be unforeseen or unexpected but that the *means* by which death is caused must be accidental and that accident is never present when an intentional act is perfomed."

Appellee proposes to show that this statement is not applicable to the facts in this case and, further, that it does not correctly announce the law in the State of Washington, which must govern in this action.

Appellant cites as the leading Washington case, *Evans v. Metropolitan Life Insurance Co.*, 26 Wn. (2d), 594; 174 P. (2d), 961. It is the view of appellee that the above case clearly distinguishes and, in fact, emphasizes the rule for which we are contending, and which was adopted by the trial court. It is noted that numerous Washington decisions are referred to in the *Evans* case which support our contention. This case would be helpful for appellant if we had a situation in fact where Ralph H. Garett had suffered a coronary occlusion while he was merely sliding wheat sacks along the bed of the truck to the end of the plank as he intended. That would coincide

with the situation in the *Evans* case where Mr. Evans voluntarily pushed his automobile along the driveway, *and nothing unforeseen, unusual or unexpected had occured.* (our emphasis).

If however, while engaged in this voluntary act, Mr. Evans had stumbled, slipped, fallen or had gotten into some awkward or strained position after some mishap had occured, such as the car getting suddenly out of control, without time for deliberation or survey of the unexpected occurence, resulting in unforeseen exertion, and a coronary occlusion, the rule announced in the *Evans* case would have no application. The Supreme Court of Washington clearly announced the rule in the *Evans* case (p. 622) in this language:

> "The conclusion we must reach from a consideration of all the cited cases is that accident is never present when a deliberate act is performed, *unless some additional, unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death.*" (our italics).

It will surely not be contended that Ralph H. Garett was legally bound to foresee and expect that a sack of wheat would suddenly get out of control and that, in what appeared to him as a sudden emergency, and without time for deliberation or appraisal of the situation, he would suddenly reach forward and grab or jerk the sack with one hand, lean over in a strained and awkward position, with his other hand against a building some 3 to 4

feet away, with accompanying emotional stress, or that he would remain there until his son could go around the truck to assist in righting the sack. If an insured must suffer such aditional, independent, unforeseen, unusual or unexpected mishaps, happenings and accidents at his peril, there is little or no protection under the accident policy acquired by decedent.

The fact is that most of our mishaps and accidents occur when we are performing intentional and voluntary acts, such as driving a car, lifting or moving objects, and the like, and we pay premiums on our insurance policies to protect ourselves against the sudden, the unusual, the unexpected and the unforseen, which are clearly accidental.

There is no evidence in this case that Mr. Garett and his son had ever unloaded wheat in this manner previously, and this was the first sack that had gotten out of control (R. 79, 81).

Mr. Garett was having no trouble sliding the sacks along the bottom of the truck, and in doing this had suffered no pain or distress (R. 78). The additional, independent, unforeseen and unexpected accident which occured, the sudden falling and overbalancing of the sack of wheat, which his fourteen-year-old son was handling, was something additional, unexpected, independent and unforeseen in relation to what Ralph H. Garett was previously deliberately and voluntarily doing.

This rule is again recognized in *Johnson v. Business Men's Assurance Co.,* 38 Wn. (2d) 245; 228 P. (2d) 760, cited on page 11 of appellant's brief. Mr. Johnson was voluntarily and deliberately removing furniture and personal belongings from his burning home; nothing unusual, unforeseen or unexpected occured which was additional, independent or accidental, which brought about his death. This court expressly recognized the rule that had there been a "slip, fall or other unforeseen occurence," the general rule, cited by appellee above, would apply.

The last mentioned *Johnson* case, decided in 1951, appears to be the latest pronouncement in Washington upon the issues involved in this appeal. It appears that Johnson made several trips into and out of the kitchen in the burning house, and there was little, if any, smoke at first, but it increased within the house as the fire progressed. There was some contention that Johnson's collapse was in fact caused by the presence of the heavy smoke on his last trip into the house. Had this unforeseen or unexpected situation been proven, there is no doubt but that death would have been caused by a "accidental means."

As the Supreme Court clearly indicated (p. 254): No medical witness

> " . . . undertook to say that death resulted from purely acidental means, *such as inhaling of smoke,*

> *encountering heat, or suffering any other injury directly caused by the fire, and independent of all non-accidental causes, whether or not occuring during the last trip into the house."* (our emphasis).

Again, on page 255 of the above decision, the court said:

> "There was thus a lack of proof that death was due to *suddenly* encountering an *unanticipated* concentration of smoke, and was therefore the result of an unexpected and unforeseen happening, additional to and independent of Johnson's activity in saving his belongings from the burning house." (Italics by the court).

Appellee respectfully submits there is no essential difference in Mr. Johnson suddenly encountering an unanticipated concentration of smoke, as above suggested, or in Ralph H. Garett suddenly being confronted with a falling object, being something unexpected and unforeseen, in addition to and independent of what he was intentionally doing.

Finally, appellant cites the cases of *Hodges v. Mutual Benefit Association,* 15 Wn. (2d) 699; 131 P. (2d) 937; and *Crowell v. Sunset Casualty Co.,* 21 Wn. (2d) 238; 150 P. (2d) 728, in support of its argument.

In the *Hodges* case, just referred to, the insured suffered a coronary thrombosis while dancing. The Supreme Court of Washington again outlined the rule as follows: (P. 704).

> "In the case at bar, the insured was doing an ordinary and customary act in his usual way and no unexpected event interposed itself to cause injury."

In the *Crowell* case, above, the insured was a fireman at a sawmill and while at work suffered a coronary occlusion. In denying recovery under the policy, the court stated: (P. 246).

> "The record contains no evidence that any one particular event occured requiring unusual exertion on the part of the insured, which might have brought about his death . . .
> "There is no evidence suggesting the intervention of any unforeseen or even unusual agency or event."

Let it be assumed in the above case that there was proof that the insured was putting cord wood in the furnace, and the pile of wood at which he was working suddenly got out of balance and started to fall, and the insured made a sudden effort to grab a falling stick or sticks, and assumed an awkward position, and was under stress and strain, to the extent that a coronary occlusion occured and death resulted. Would appellant contend there could be no recovery under the policy because what insured was doing was intentional, that this happening was usual, to be expected and to be foreseen, and that this occurence by itself did not involve the insured, and that all the insured had to do was let the wood fall? Or that this is not accidental? Or should he not have foreseen and expected all of this in advnce? Is relief to be denied because the wood is not actually falling on the in-

sured, or the wood would not be damaged had he elected to allow it to fall on the floor, or that the whole boiler firing was a normal process, and that the insured, an experienced fireman, was bound by the possibility that this mishap might at some time occur?

On pages 14 and 15 of its brief, appellant notes that the original complaint does not allege in detail just how the accident occured. As the court knows, pleadings are deemed amended to conform to the proof, unless objected to as a variance, and the Findings of the Court are the final basis for the judgment rendered herein.

York v. Gaasland Co., 41 Wn. (2d) 64, 247 P. (2d) 556.

2. Referring to the second portion of appellant's argument (page 13), appellee feels that the contention of appellant that there was no unusual, unexpected or unforeseen happening constituting an accident in this case has already been fully answered.

3. Appellant argues (page 15) that the occurence did not by itself involve Mr. Garett in any event. It is argued that the unusual occurence must happen to the insured or operate upon him without regard to his own act or volition, and must not be collateral. There is certainly nothing in the *Evans* or *Johnson* cases, mentioned by appellant on page 16, to bear out such contention, or that such argument is pertinent. All are agreed that the

stalling of the car and the burning of the house involved in the two cases just mentioned were unexpected, unusual and unforeseen, and that what these men did was voluntary. We should all be agreed, too," that in these cases had something additional and independent occured, to bring these cases within the admitted rule, the insured would have been involved, and it would not be something of his own act or volition. The illustration of the falling wood pile, in discussing the *Crowell* case, above, clearly emphasizes the distinction. Let us suppose, in the *Evans* case, that the car had gotten suddenly out of control and Mr. Evans had suffered an attack and died from over exertion while attempting to control this additional and independent happening. Could it be argued that Mr. Evans was not involved, or that this unusual occurence did not happen to or operate upon him, and was collateral, and that what he did was purely voluntary, or that he should have let the car go, or that he had no legal rights if he suffered injury or death in trying to meet this unexpected and unforeseen emergency?

Further Washington Cases in Support of Judgment.

One of the leading decisions relied upon by appellee herein is that of *Zinn v. Equitable Life Insurance Co.,* 6 Wn. (2d) 379, 107 P. (2d) 921.

Earl W. Zinn had high blood pressure, and, in course of treatment his doctor made an incision in the left arm to withdraw some blood. Thereafter, blood poisoning occured, from which Mr. Zinn died. The insurance company insisted that decedent did not die as a result of accident "directly and independently of all other causes, from bodily injuries affected solely through violent, external and accidental means."

It is noted that the language just quoted is quite identical to that contained in the policy now under consideration. (R. 34, 35).

In deciding the above case, the Washington Supreme Court discussed and analyzed numerous cases, comparing the two opposing views generally contended for. The accepted rule was again announced (P. 384).

> "The death is accidental, even though intentional, where the results are unusual, unexpected or unforeseen."

It was pointed out by the court that, while the making of the incision was an intentional act, and not uncommon, the infection, although it sometimes occurs, was unforeseen and unexpected, and was as much an accident as though Mr. Zinn had been struck and killed by an automobile while on his way to the hospital. The above decision was reaffirmed in the *Evans* case (P. 617).

Another pertinent decision is that of *Graham v. Police and Firemens Insurance Association,* 10 Wn. (2d) 288;

116 P. (2d) 352. Oscar H. Ebbinghouse was a fireman in Seattle and had contracted a heart condition designated as angina pectoris. While at home, his daughter's clothing caught fire while she was working in the basement. To assist his daughter, he voluntarily started down the basement steps, and while running or jumping down the steps, he fell and injured himself, and, in extinguishing the fire, his hands were severely burned. Thereafter, he became quite ill, and ten days after the mishap above described he died of a coronary occlusion.

A claim was filed for death by accidental means and the insurance company refused payment. The company claimed that, because the insured had a disease of the heart, there was no liability for death through accidental means. In upholding the right to recover under the policy, the court used this language:

> "In order to recover under a policy such as we have before us, the law does not require that a person must be in perfect health at the time an accident occurs. *Pierce v. Pacific Mutual Life Insurance Company,* 7 Wn. (2d) 151, 109 P. (2d) 322. If it were otherwise, an accident policy such as the one under consideration would be of no value after the insured had contracted some disease, regardless of the fact that premiums had been paid for many years. Such cannot be the intent of the contract. It is only necessary for the evidence to disclose that the accident was a direct and proximate cause of the death, and that the proximate cause is"
>
> " . . . that which sets in motion a train of events

> which brings about a result without the intervention of any force operating or working actively from a new and independent source."

The foregoing *Graham* case was cited and reaffirmed in the *Evans* decision (P. 618).

Carpenter v. Pacific Mutual Life Insurance Co., 145 Wash. 679; 261 Pac. 792, supports the judgment in favor of appellee. The insured was a farmer. Although his hands were somewhat abraded, he deliberately and intentionally engaged in skinning a sheep. Appellant could well argue that there was no accident because what the insured did was intentional, that the resulting infection should have been expected and foreseen, and that the infection did not happen to him without his own act or volition, and was merely collateral.

Upon appeal, the court held that the insurer was liable for loss of life "resulting independently of all other causes, from bodily injuries effected through external, violent and accidental means."

The foregoing decision was reaffirmed and commented upon in the *Evans* case, as follows, (p. 615):

> "Clearly here was a case of an unsual, unexpected and unforeseen event accompanying the voluntary act prior to the injury . . . the blood poisoning infection—so that the injury might be said to be accidental means."

In the view of appellee, there is no essential difference

between the blood poisoning infection there and the coronary occlusion here, since in either instance there was an "unusual, unexpected and unforeseen event accompanying the voluntary act prior to the injury."

In the *Evans* decision, also, the death or injury involved in the following cases were reaffirmed by the Washington Supreme Court as due to accidental means in relation to the policies of accident insurance held by the respective insured. It is to be noted that in some of these cases the insurer sought to establish non-liability because of pre-existing physical ailment.

Hanley v. Accidental Life Insurance Co., 164 Wash. 320; 2 P. (2d) 636. Insured suffered an accidental leg injury. An infected portion of the blood vessel surrounding the injury became detached and lodged in the insured's right lung, causing death.

Kearney v. Washington National Insurance Co., 184 Wash. 579; 52 P. (2d) 903. Insured was a watchman and fell down stairs while making his rounds. Blindness resulted thereafter and it was deemed accidental, "even though at the time he was suffering from existing diseases which contributed thereto after being precipitated by the fall."

Hill v. Great Northern Life Insurance Co., 186 Wash. 167; 57 P. (2d) 405. Insured had an existing coronary ailment and suffered a cerebral hemorrhage as a re-

sult of shock attendant upon an automobile collision.

Hemrich v. Aetna Life Insurance Co., 188 Wash. 652; 63 P. (2d) 432. Insured slipped and fell on a sidewalk, fracturing his leg. He thereafter died of thrombosis of the pulmonary artery, originating in the region of the fracture.

Kane v. Order of United Commercial Travelers, 3 Wn. (2d) 355, 100 P. (2d), 1036. Insured suffered an accidental fall, which aggravated an existing hernia, requiring an operation, with resulting lumbar pneumonia and death.

Pierce v. Pacific Mutual Life Insurance Company of California, 7 Wn. (2d) 151; 109 P. (2d) 322. Insured was suffering from arteriosclerosis and high blood pressure. While under emotional strain and shock caused by an apparent and imminent danger of an auto collision, he suffered a cerebral hemorrhage or stroke. The insurer maintained that the condition of insured was not the result of an accident, because of his preexisting physical ailment.

The court held (p. 165) that this "was but a condition, and not a concurring cause" of the accident.

Findings of Fact Not Excepted to by Appellant.

On page 3 of its brief, appellant asserts:

> "The facts leading up to Ralph H. Garett's death are very little in dispute and are summarized in the trial court's Finding of Fact, to which no exception has been taken on this appeal."

Under the rule in Washington, unless Findings of Fact of the Court are specifically excepted to upon an appeal, such Findings are accepted as the established facts in the case.

Fowles v. Sweeney, 41 Wn. (2d) 182; 248 P. (2d) 400.

It is the earnest view of appellee that Finding of Fact number XI (R. 18, 19), in no way excepted to, is in itself decisive of this appeal. Because of its importance, we desire to quote such Findings as a part of appellee's brief:

> "That the coronary arteries of the said Ralph H. Garett had narrowed to about one-third (1/3) of their normal size, but that the amount of blood going through such coronary to supply the cardiac muscle would be a limited amount *sufficient to do ordinary exertion,* and that the said Ralph H. Garett *was able to move said sacks along the bed of said truck while he was doing so at a steady pace, and he suffered no pain therefrom.* That, when the said sack of seed wheat had gotten beyond the control of Ralph Garett, his son, as above described, and the said Ralph Garett, quickly or suddenly jerked or grabbed said falling sack, and leaned over from the end of said truck, supporting his own weight by leaning over from the end of said truck to the building near by, and partially supporting the weight of the sack of wheat with the

other hand, such situation constituted *additional* exertion so as to build up an *unusual* amount of need for blood in the heart, and, by reason thereof, the heart was unable to sustain such *additional* exertion, *and that the additional exertion, as above described, was the direct and proximate cause of an acute or sudden coronary attack being suffered by the said Ralph H. Garett, which thereafter resulted in his death from a thrombus or blood clot,* which acted as a plug to stop up all blood going through the artery to his heart. That such a closure or stoppage of the artery of said Ralph H. Garett resulted in sudden pain, evidenced almost immediately thereafter, and that the resulting blood clot was sufficient to stop the flow of blood through said artery to the heart. *The court finds that the additional exertion experienced by the said Ralph H. Garett, as above described, was sufficient to produce the thrombus or blood clot which thereafter produced the death of the said Ralph H. Garett.* (Italics ours).

A reading of the foregoing, we respectfully submit, necessarily and logically warrants the conclusions of the trial court (R.20) that the above described occurence "was an unusual, unexpected and unforeseen event, and the court *finds* that the *same* constituted an accident," and that the coronary attack as described in the Findings amounted to an accident as defined by the insurance policy, and that decedent's death "resulted directly and exclusively of all other causes, from bodily injury sustained solely through external, violent and accidental means, while he was engaged in his us-

ual occupation, and while the said contract and policy of insurance was in full force and effect, as aforesaid," and that appellant is entitled to judgment accordingly.

Conclusion

Under the facts admitted herein, and under existing law of the State of Washington, Ralph H. Garett, now deceased, died as the result of accidental means, as contemplated and defined by the policy of insurance in force between decedent and appellant insurer herein at the time of death, and that appellee, as his widow, and as administratix of his estate, is entitled to receive payment of $3,750.00, as provided by said insurance policy, together with interest and costs by law provided. The judgment entered by the Honorable Trial Court is in all respects correct and should be affirmed.

Respectfully submitted,

RAFTIS & RAFTIS

Attorneys for Appellee.

No. 14748

United States Court of Appeals

For the Ninth Circuit.

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-18-55

No. 14748

United States
Court of Appeals
For the Ninth Circuit.

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisca, Calif.—7-8-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Bail Bond on Appeal 14

Certificate of Clerk to Record on Appeal 196

Exhibit, Defendant's:

No. A-14-A—Transcript of Un-American Activities Hearing Re Defendant 82

General Finding 9

Indictment 3

Judgment, Sentence and Order of Probation ... 9

Motion to Dismiss Indictment 6

Motion for New Trial 8

Names and Addresses of Counsel 1

Notice of Appeal 13

Order Authorizing Transmittal of Exhibits 15

Order Denying Motion to Dismiss Indictment .. 7

Statement of Docket Entries 12

Statement of Points, Appellant's 199

INDEX PAGE

Transcript of Proceedings 16

Oral Opinion 177

Witnesses' Defendant's:

Morrow, Robert A.

—direct 68

Poor, Rev. George Lester

—direct 77

—cross 79

Todd, Charles H.

—direct 71

Witness, Plaintiff's:

Tavenner, Frank S., Jr.

—direct 25

—cross 40

Waiver of Jury Trial 7

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Seattle 4, Washington.

United States District Court, Western District of Washington, Northern Division

No. 49,064

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL HARVEY JACKINS,

Defendant.

INDICTMENT

The Grand Jury charges:

Introduction

That on or about June 14, 1954, at Seattle, in the Northern Division of the Western District of Washington, a duly authorized subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress.

That the defendant Carl Harvey Jackins appeared as a witness before that subcommittee, at the place and on the date above stated, and was asked questions which were pertinent to the question then under inquiry. At the place and time stated, the defendant Carl Harvey Jackins refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant Carl

Harvey Jackins and which he, the said Carl Harvey Jackins, refused to answer.

Count I.

Will you tell the committee please, briefly, what your employment record has been since 1935.

All in violation of Title 2, U.S.C., Sec. 192.

Count II.

How were you employed in 1948.

All in violation of Title 2, U.S.C., Sec. 192.

Count III.

Did you hold an official position in 1948 or at any time prior thereto, in Local 46 of the International Brotherhood of Electrical Workers.

All in violation of Title 2, U.S.C., Sec. 192.

Count IV.

Were you expelled from Local 46 of the International Brotherhood of Electrical Workers in 1948.

All in violation of Title 2, U.S.C., Sec. 192.

Count V.

Were you also expelled as business agent of the Building Service Employees' Union sometime prior to 1948.

All in violation of Title 2, U.S.C., Sec. 192.

Count VI.

Were you at any time expelled from Lodge 751 of the Aero Mechanics Union.

All in violation of Title 2, U.S.C., Section 192.

Count VII.

Is this (work of personal counseling) something originated by the Communist Party as part of its program.

All in violation of Title 2, U.S.C., Section 192.

Count VIII.

Who are the other people, then, when you used the word "we," that are associated with you in this movement.

All in violation of Title 2, U.S.C., Section 192.

Count IX.

But what is the name of the group.

All in violation of Title 2, U.S.C., Section 192.

Count X.

Does the group that you referred to have an office with you in the same office that you work in.

All in violation of Title 2, U.S.C., Sec. 192.

A True Bill.

/s/ WALLACE L. COUSENS,
Foreman.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

C.R. 108.
Comm.
Bail: $1000.00.

[Endorsed]: Filed September 15, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT

The defendant moves that the indictment be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States of America.

2. Certain questions propounded by the subcommittee of the Committee on Un-American Activities of the House of Representatives, upon which are based counts of the indictment, were beyond the scope and jurisdiction of the investigation then being conducted by the subcommittee.

/s/ ARTHUR G. BARNETT,
/s/ VERNON W. TOWNE,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 4, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS INDICTMENT

This Cause coming on regularly for hearing upon the motion of the defendant to dismiss the indictment in the above-entitled cause, and after argument of counsel, it is by the Court, this 4th day of October, 1954,

Ordered that the motion to dismiss the indictment is hereby denied, without prejudice to the renewal thereof at any time, or during the course of the trial of the general issue.

Done in open court this 4th day of October, 1954.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ VERNON W. TOWNE,
Attorney for Defendant.

Approved:

/s/ RICHARD D. HARRIS,
Asst. U. S. Atty.

[Endorsed]: Filed October 4, 1954.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL BY DEFENDANT

Comes now the defendant Carl Harvey Jackins

and does hereby elect in writing to waive trial by jury in the above cause.

Dated this 7th day of March, 1955, at Seattle, Washington.

/s/ CARL HARVEY JACKINS.
/s/ ARTHUR G. BARNETT,
Attorney for Carl Harvey Jackins.

Receipt of copy acknowledged.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The judgment is contrary to the weight of the evidence.
3. The judgment is not supported by substantial evidence.
4. A new trial is in the interests of justice.

Dated the 24th day of March, 1955.

/s/ ARTHUR G. BARNETT,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

GENERAL FINDING

I find the defendant, Carl Harvey Jackins, guilty as charged in Counts I, II, VIII, IX and X of the Indictment in the above-entitled cause.

Done in Open Court this 25th day of March, 1955.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed March 25, 1955.

United States District Court, Western District of Washington, Northern Division

No. 49064

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL HARVEY JACKINS,
Defendant.

JUDGMENT, SENTENCE AND ORDER OF PROBATION

On this 25th day of March, 1955, the attorney for the Government, and the defendant, Carl Harvey Jackins, appearing in person and being represented by Arthur G. Barnett, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of

the Indictment was given the defendant and the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I, II, VIII, IX and X; that the Probation Officer of this district has made a presentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant, Carl Harvey Jackins, having waived a jury, has been tried and convicted by the Court and was found guilty of the offense of violation of Title 2, Section 192, as charged in Counts I, II, VIII, IX and X of the Indictment, and the Court having entered its General Finding and having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that as to Counts I, II, VIII, IX and X the defendant is guilty as charged in Counts I, II, VIII, IX and X of the Indictment and is convicted.

It Is Adjudged and Ordered that the defendant, on Count I of the Indictment, be committed to the custody of the Attorney General of the United States for imprisonment in such institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Six (6) Months, and further, that the defendant shall pay a fine to the United States of America in the sum of Two Hundred Fifty ($250.00) Dollars, for which fine let civil execution issue.

It Is Further Adjudged and Ordered that the defendant on each of Counts II, VIII, IX and X of the Indictment, be committed to the custody of the Attorney General of the United States for imprisonment in such institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Six (6) Months, the execution of the sentences on each of Counts II, VIII, IX and X to be concurrent with, and not consecutive to, the execution of the sentence on Count I, and further, that the defendant shall pay a fine to the United States of America in the sum of Two Hundred Fifty ($250.00) Dollars on each of Counts II, VIII, IX and X, said fines to be concurrent with, and not cumulative with each other or the fine imposed on Count I, making a total fine as to all counts of Two Hundred Fifty ($250.00) Dollars, and the payment of Two Hundred Fifty ($250.00) Dollars by the defendant shall constitute payment of all fines as to all counts imposed herein.

It Is Further Adjudged and Ordered that the execution of the imprisonment sentences herein be and hereby is Suspended and the defendant is placed on probation for a period of Two (2) Years, commencing this date, upon the following conditions:

The defendant shall be placed upon probation as provided by the statutes of the United States relative to probation during his good behavior and until further order of the Court, and upon the express condition that said defendant does not during said

probationary period violate any law of the United States or of any State or community where he may be, and shall report regularly to the United States Probation Officer at the times and in the manner said Officer shall direct.

Done in Open Court this 25th day of March, 1955.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES

1. Indictment or information for Refusal to testify before Congressional Sub-committee, T2 Sec. 192, filed September 15, 1954.

2. Arraignment, September 23, 1954.

3. Plea to indictment: Not Guilty, September 23, 1954.

4. Motion to withdraw plea of guilty denied: ....., 19...

5. Trial by jury, or by court if jury waived: Trial by Court—March 14, 15, 16, 1955.

6. Verdict or finding of guilt: Court finds deft. guilty as charged in Counts I, II, VIII, IX and X, March 16, 1955.

7. Judgment—(with terms of sentence) or order: Six months and pay fine of $250.00 as to each count, concurrent, execution of imprisonment suspended and deft. placed on probation two years, total fine on all counts $250.00. Entered March 25, 1955.

8. Notice of appeal filed March 25, 1955.

Dated: March 29, 1955.

Attest:

MILLARD P. THOMAS,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The appellant is Carl Harvey Jackins. Address: 6753 Twenty-third N.W., Seattle, Washington.

Appellant's attorney: Arthur G. Barnett, 1304 Northern Life Tower, Seattle 1, Washington.

Offense: Violation of Title 2, U.S.C., Sec. 192.

The judgment and sentence given March 25, 1955, by the Honorable George H. Boldt is:

The above-named appellant hereby appeals to the United States Court of Appeals of the Ninth Circuit from the above-stated judgment.

/s/ CARL HARVEY JACKINS,
Defendant.

/s/ ARTHUR G. BARNETT,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Know All Men By These Presents:

That I, Carl Harvey Jackins, am held firmly bound unto the United States Government in the penal sum of One Thousand Dollars ($1,000.00) for the payment of which sum well and truly to be made I bind and obligate myself, my heirs, executors and administrators, by the deposit herewith of the sum of one thousand dollars cash.

Signed and Sealed this 25th day of March, 1955.

The condition of the foregoing obligation is such that whereas the above-named principal was convicted under Title 2, U.S.C., Sec. 192, on the 25th day of March, 1955, and thereafter filed a motion for a new trial which came on for hearing thereafter and was by the Court overruled and thereafter was sentenced on Friday, March 25, 1955, to serve six months, suspended, and pay a fine of Two Hundred Fifty ($250.00) Dollars.

That the said Carl Harvey Jackins shall well and truly make his personal appearance before the United States Appellate Court for the Ninth District until discharged by due course of the law, then and there as required by said Court, this obligation shall become void, otherwise to remain in full force, virtue and effect, and further that the defendant shall not leave the jurisdiction of the above-entitled Court.

/s/ CARL HARVEY JACKINS.

The foregoing bond approved, and the Clerk of the above-entitled Court is hereby authorized and directed to accept the One Thousand Dollars cash Bail Bond now on deposit from the defendant in lieu of returning the same to the defendant, as the One Thousand Dollars cash deposit by the defendant as appeal bond, this 25th day of March, 1955.

/s/ GEO. H. BOLDT,
Judge.

Approved as to form:

/s/ RICHARD D. HARRIS,
Asst. U. S. District Attorney.

Bond approved:

/s/ RICHARD D. HARRIS,
Asst. U. S. Attorney.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

ORDER AUTHORIZING TRANSMITTAL OF EXHIBITS

The defendant having moved for an order directing and authorizing the Clerk to transmit the Exhibits filed in the above-entitled cause to the Clerk of the Ninth Circuit Court of Appeals, and it appearing to the Court and from the records and the files herein that the defendant has appealed to said court, and the Court being fully advised in the premises and from the records and files herein, Now, Therefore,

It Is Hereby Ordered that the Clerk of this Court be and he hereby is authorized and directed to transmit all of the Exhibits in the above-entitled cause to the Clerk of the Ninth Circuit Court of Appeals, San Francisco, California, in connection with the appeal of the defendant.

Done in Open Court this 22nd day of April, 1955.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/RICHARD D. HARRIS,
Asst. U. S. Attorney.

/s/ ARTHUR G. BARNETT,
Attorney for Defendant.

[Endorsed]: Filed April 22, 1955.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 49064

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL HARVEY JACKINS,
Defendant.

PROCEEDINGS

Transcript of Trial Proceedings in the above-entitled and numbered cause had before the Honor-

able George H. Boldt, United States District Judge, in the United States Courthouse at Seattle, Washington, on the 14th day of March, 1955.

Appearances:

RICHARD D. HARRIS, ESQ.,
Assistant United States District Attorney,
Appeared on Behalf of the Plaintiff.

ARTHUR G. BARNETT, ESQ.,
Appeared on Behalf of the Defendant.

(Whereupon, the following proceedings were had, to wit:)

The Court: No. 49064, United States vs. Carl Harvey Jackins for trial. Is the case ready?

Mr. Harris: Yes, your Honor.

Mr. Barnett: I have been using as a stenographer for the past two weeks Miss Jackins, secretary, sister of the defendant, and if there is no objection to it, I'd like to have her sit with me to take notes to facilitate anything I want her to take down. I have her here.

The Court: Ordinarily I don't permit any lay persons to be at the counsel table, but—and wouldn't permit it in the trial of a jury case—but it being a non-jury case under those circumstances it will be, permission will be granted.

Mr. Barnett: Thank you very much, your Honor.

The Court: The waiver of the defendant of jury trial so filed and signed by the defendant and by his counsel, and I take it Mr. Barnett, that it is your

client's desire to waive jury trial and proceed with non-jury trial?

Mr. Barnett: That is right, your Honor.

The Court: You have explained fully to him that in such case the Court will hear and determine questions of fact as well as of law?

Mr. Barnett: Yes.

The Court: And he has the right to have a jury trial if [3*] he wishes. Is that right?

Mr. Barnett: Yes, your Honor, I have explained it.

The Court: Very well, I am willing to try the case non-jury and accordingly direct that a minute entry be entered approving request for waiver of jury trial and direct that the case be tried non-jury. Ready to proceed, are you?

Mr. Harris: Yes, your Honor.

Mr. Barnett: Your Honor, the defendant will request special findings.

The Court: That may be.

Mr. Barnett: I'd like to file at this time defendant's brief.

The Court: Proceed with your statement, Mr. Harris.

Mr. Harris: I am willing to acknowledge receipt——

Mr. Barnett: If you will——

The Court: Very well, proceed.

Mr. Harris: In view of the fact the jury has been waived in this case my statement of fact will

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

be rather brief. My opening statement, I should say. The government intends to prove the allegations contained in the indictment, that is in particular, that on or about June 14, 1954, at Seattle, Northern Division of the Western District of Washington, a duly authorized Subcommittee of the Un-American Activity of the House of Representatives was conducting hearings in pursuance to [4] Law 601, Section 121, 79th Congress, 2nd Session, and to House Resolution 5, 83rd Congress, that defendant Carl Harvey Jackins appeared as a witness before that Committee at the place and time above mentioned and was asked certain questions which were pertinent to the question then under inquiry. At the place and at the time stated the defendant Carl Harvey Jackins refused to answer those pertinent questions and the allegations of this particular introduction that I am referring to at this time are incorporated and adopted into it as to each of the counts set forth in the indictment, each of said counts merely setting for the question in particular which the defendant Carl Harvey Jackins refused to answer, they are set forth in ten counts and I will attempt to prove that these were asked the defendant in this case. He was asked, "Will you tell the Committee please briefly what your employment record was and has been since 1935?" That he refused to answer that question. Further, that he was asked the question, "How were you employed in 1948?" That he refused to answer that question. Further, that he was asked the question, "Did you hold an official position in 1948 or at any

time prior thereto in Local 46 of the International Brotherhood of Electrical Workers?" And he refused to answer that question. He was asked the question, "Were you expelled from Local 46 of the International Brotherhood of Electrical Workers in 1948?" He refused to answer that question. [5] He was asked the question, "Were you also expelled as business agent of the Building Service Employees' Union sometime prior to 1948?" And he refused to answer that question. Further, he was asked the question, "Were you at any time expelled from Lodge 751 of the Aero Mechanics Union?" And refused to answer that question. He was asked the question, "Is this," referring to his personal counseling, present employment, "something originated by the communist party as part of its program?" And he refused to answer that question. He was asked, "Who are the other people then when you use the word 'we' that are associated with you in this movement?" That is, in the personal counseling business. And he refused to answer that question. He was asked the question, "But what is the name of the group?" And he refused to answer that question. He was asked the question, "Does the group that you referred to have an office with you in the same office that you work in?" And he refused to answer that question.

The Court: Do you wish to make a statement now, Mr. Barnett?

Mr. Barnett: Simply this, your Honor, that certain motions made by defendant were reserved by agreement between counsel and the Court until Judge Lindberg——

The Court: There is an order here reciting Judge Lindberg overruled the motions with the understanding they could be renewed at a later time. [6]

Mr. Barnett: That is right.

The Court: Words to that effect.

Mr. Barnett: That is right, and without waiving any rights by making this statement, we will move for judgment of acquittal at close of the plaintiff's case. The defendant really wants to state that the defendant will be showing that out of some sixty-nine questions or so he answered all but ten and that as to those ten the first six counts fall within clear reasonable apprehension, evidence as to which we will submit to the Court, and that as to the last four counts part of the ground of our motion goes towards the non-pertinency of those four questions plus the matters developed in the brief of the defendant to the effect that those questions came out of an atmosphere which at the time was getting very vigorous and trying and surrounded by the rest of the atmosphere at the hearing, that the Court should then not construe the failure to give answers as being wilfull even if the Court holds that the last four could conceivably be pertinent under the very board rulings and interpretations that anything that Congress inquires into is in some way pertinent.

And I don't want to lose sight of making one other additional fact, your Honor, as to those last four counts. The defendant had given one answer, a long answer somewhat bearing on the subject

matter which shows the non-pertinency of the [7] last four counts. That is all very fully developed in the brief of the defendant. The only other——

The Court: As I understand it, the counts 7, 8, 9 and 10, your contention there is that the, they were not pertinent?

Mr. Barnett: That is one.

The Court: And Counts 1 to 6 inclusive you contend were within the privilege for non-incrimination privilege?

Mr. Barnett: Yes, your Honor.

The Court: All right.

Mr. Barnett: I think that is all I have to say at this time.

The Court: Go ahead.

Mr. Harris: If your Honor please, at this time I'd like to have marked as Plaintiff's Exhibit number 1 the House Resolution No. 2.

The Clerk: Plaintiff's Exhibit No. 1 has been marked for identification.

(Plaintiff's Exhibit No. 1 marked for identification.)

Mr. Harris: And Plaintiff's No. 2, House Resolution No. 5.

The Clerk: Plaintiff's Exhibit No. 2 has been marked for identification.

(Plaintiff's Exhibit No. 2 [8] marked for identification.)

Mr. Barnett: No objection to Exhibit No. 1, your Honor.

The Court: Number 1 is admitted in evidence.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

Mr. Harris: And Plaintiff's Exhibit 3 is a certification, might be called a certification as to the members on the Committee.

The Clerk: Plaintiff's Exhibit No. 3 has been marked for identification.

(Plaintiff's Exhibit No. 3 marked for identification.)

Mr. Barnett: Number 2, no objection to Exhibit No. 2, your Honor.

The Court: Exhibit No. 2 is admitted in evidence.

(Plaintiff's Exhibit No. 2 admitted in evidence.)

Mr. Harris: And I ask to be marked for identification Exhibit No. 4 which is a document referring to the House Report holding the defendant Carl Harvey Jackins in contempt of Congress.

The Clerk: Plaintiff's Exhibit No. 4 has been marked for identification.

(Plaintiff's Exhibit No. 4 marked for identification.) [9]

Mr. Barnett: No objection to Exhibit 3, your Honor.

The Court: Exhibit 3 is admitted in evidence.

(Plaintiff's Exhibit No. 3 admitted in evidence.)

Mr. Harris: Exhibit No. 5, House Resolution 680.

Mr. Barnett: No objection to No. 4, your Honor.

The Court: No. 4 is admitted in evidence.

(Plaintiff's Exhibit No. 4 admitted in evidence.)

The Clerk: Plaintiff's Exhibit No. 5 has been marked for identification.

(Plaintiff's Exhibit No. 5 marked for identification.)

Mr. Harris: And No. 6 I ask to be marked for identification, Speaker of the House Forwarding the Resolution, House Report to the United States Attorney in this district.

Mr. Barnett: No objection to Exhibit No. 5, your Honor.

The Court: Exhibit 5 is admitted in evidence.

(Plaintiff's Exhibit No. 5 admitted in evidence.)

The Clerk: Plaintiff's Exhibit No. 6 marked for identification.

(Plaintiff's Exhibit No. 6 marked for identification.) [10]

Mr. Barnett: No objection to No. 6, your Honor.

The Court: No. 6 admitted in evidence.

(Plaintiff's Exhibit No. 6 admitted in evidence.)

The Clerk: Plaintiff's Exhibit No. 7 marked for identification.

(Plaintiff's Exhibit No. 7 marked for identification.)

Mr. Harris: For the record Plaintiff's Exhibit No. 7 for identification might be referred to as House Report No. 2471.

Mr. Barnett: No objection, your Honor, I have seen this.

The Court: Very well, admitted in evidence, No. 7.

(Plaintiff's Exhibit No. 7 admitted in evidence.)

Mr. Harris: I'd like to call Mr. Tavenner. [11]

FRANK S. TAVENNER, JR.

being first duly sworn on oath, was called as a witness on behalf of the Plaintiff and testified as follows:

The Clerk: State your full name and spell your last name.

The Witness: My name is Frank S. Tavenner, Jr., T-a-v-e-n-n-e-r.

Direct Examination

By Mr. Harris:

Q. What is your address?

A. Washington, D. C.

Q. And what is your occupation?

A. I am counsel for the Committee on Un-American Activities of the House of Representatives.

Q. Are you presently employed in that capacity?

A. I am.

(Testimony of Frank S. Tavenner, Jr.)

Q. And were you so employed on June 14, 1954? A. I was.

Q. And just briefly what does your position—what are the duties connected with your position as counsel for that Committee?

A. Counsel for the Committee has the task of examining the witnesses both in open and closed session of the Committee. He attends to other legal matters of the Committee such as preparations of bills and reports. He is from time to time [12] assigned particular tasks in connection with investigations.

Q. Now in open meeting, is that a—you said open and closed meeting, I believe. You mean an open public hearing as distinguished, do you, from a closed executive session where the public are not invited? A. That is right.

Q. All right. Now what is the function of the Committee on Un-American Activities?

A. Well, the Committee on Un-American Activities is one of the nineteen standing committees of the House of Representatives and by enactment of a statute it is authorized to conduct from time to time investigations of Un-American activities within the United States and of the dissemination of Un-American and subversive propaganda which originated abroad or which originates in this country and which attacks the principles of the Constitution.

Q. Now——

A. And I might say and other matters related

(Testimony of Frank S. Tavenner, Jr.)

thereto which would enable a Congress to pass remedial legislation.

Q. As a result of that particular function does it hold public hearings? A. Yes, it does.

Q. In different portions or sections of the United States? A. Yes. [13]

Q. And what is the purpose of holding these hearings?

A. The purpose of holding the hearings is to conduct the investigation which the Committee has been empowered by and directed by Congress to conduct.

Q. All right. Now did the Committee hold such a hearing in Seattle, Washington, in June of 1954?

A. It did.

Q. And were you present while those hearings were being held? A. Yes.

Q. Who, if anyone, was Chairman of that Committee on say June 14, 1954?

A. Representative Harold H. Velde from Illinois was Chairman.

Q. Who else besides Congressman Velde sat on the Committee at that time?

A. Other persons on the Committee were Representative Donald L. Jackson of California, Representative Kit Clardy of Michigan, Representative Gordon Scherer of Ohio, Representative Clyde Doyle of California, and Representative James B. Frazier, Jr. of Tennessee.

Q. Now——

(Testimony of Frank S. Tavenner, Jr.)

Mr. Barnett: Excuse me, counsel, did he mention Mr. Scherer?

The Witness: I did. [14]

The Court: He did.

Mr. Harris: I believe he did.

Q. (Continuing): Now on that particular day did you have occasion to have come before you the defendant Carl Harvey Jackins? A. Yes.

Q. In what capacity did he appear?

A. He was subpoenaed as a witness before the Committee.

Q. And the subpoena that was issued by the Committee was for his attendance, was it?

A. Yes.

Q. And was he interrogated at that hearing?

A. Yes, he was.

Q. And by whom, if you recall?

A. I began the interrogation and conducted it throughout except during such periods of time as members of the Committee asked questions.

Q. Now what was the purpose for calling or the reason for calling the defendant before the Committee?

A. Well, the Committee being engaged in the investigation in which it was engaged had learned that this witness in all probability had facts within his knowledge which would have been of value to the Committee in performing its investigative duties.

Q. I am handing you now what has been marked or admitted [15] into evidence as Plaintiff's Ex-

(Testimony of Frank S. Tavenner, Jr.)
hibit No. 7 and ask you to take a glance at that if you will and state whether or not you have seen it before?

A. Yes, sir, I am familiar with this document.

Q. And was that document prepared either by you or under your supervision?

A. Yes, sir, it was dictated by me.

Q. And was that report—and I believe it is a report, is it not? A. Yes, sir.

Q. What in effect did that report do?

A. This report was made pursuant to action of the Committee to the Congress for the purpose of giving the Congress the facts relating to the testimony of this witness together with the recommendation on the part of the Committee that this witness be proceeded against for contempt of the House of Representatives.

Q. And was that in fact done by the House of Representatives? A. It was.

Q. Now in referring to that exhibit does that contain testimony, question and answer form testimony of the defendant and members of the House Committee? A. It does.

Q. Does it contain a complete record of all his testimony [16] before the Committee?

A. No, sir it does not.

Q. All right. Does it contain the ten questions to which I have previously referred to and which are contained in this indictment, does it contain the ten questions and the defendant's refusal to answer those questions? A. Yes, sir.

(Testimony of Frank S. Tavenner, Jr.)

Q. Count 1 refers to the question by yourself——

Mr. Harris: I am reading on page 3, counsel, as to count 1.

Q. (Continuing): ——of Mr. Jackins, "Will you tell the Committee briefly what your employment record has been since 1935?" Was that question asked by you? A. Yes, sir.

Q. And did the defendant refuse to answer that question? A. Yes, sir, he did refuse.

Q. What was the purpose in asking the defendant that particular question?

A. There were several purposes for asking the question. One was the question of proper identification of the witness. Another question was—another point was this, that the Committee in order to investigate the knowledge which it understood this witness may have regarding communist party activities desired to know his background in the community. That is, how he was employed, what his opportunities for knowledge [17] were in the various fields in which the Committee was interested. Those are the principal things that occur to me now.

Q. All right. Now referring to count number 2 which appears on page 4 about half way down. A question by yourself directed to Mr. Jackins. "Q. How were you employed in 1948?" Do you recall asking him that question? A. Yes, I do.

Q. And do you recall that he refused to answer?

A. Yes, sir.

Q. And in substance and effect would you an-

(Testimony of Frank S. Tavenner, Jr.)

swer for the reason for asking that question would be similar to that——

A. Substantially the same.

Q. ——as you previously gave to the previous question? A. Yes.

Q. Now referring, following that, immediately following that referring to count 3 of the indictment, a question by you propounded to Mr. Jackins, "Q. Did you hold an official position in 1948 or at any time prior thereto in Local 46 of the International Brotherhood of Electrical Workers?" Was that question asked by you? A. Yes, it was.

Q. And did the defendant refuse to answer that question? A. Yes, sir.

Q. What was the purpose in asking the defendant that [18] particular question?

A. The Committee had information of the special interest of the communist party in the northwestern area within the general field of industries and defense plans and also in unions. The Committee was desirous of ascertaining what opportunity this witness may have had to have known of conditions within the union inquired about.

Q. Now directing your attention to page 5, the bottom of the page in count 4 of the indictment, question by yourself directed to Mr. Jackins, "Q. Now were you expelled from Local 46 of the International Brotherhood of Electrical Workers in 1948?" Was that question asked by you?

A. Yes, it was.

Q. And did he refuse to answer that question?

A. He did.

(Testimony of Frank S. Tavenner, Jr.)

Q. And would your answer be, as far as the reason goes substantially the same as the one that you gave for the immediately preceding question?

A. It is.

Q. Now referring to page 6, about a third of the way down, count 5 of the indictment, question asked by yourself of Mr. Jackins, "Were you also expelled as business agent of the Building Service Employees Union sometime prior to 1948?" Did you ask that question? A. Yes, I did.

Q. And did Mr. Jackins refuse to answer that question? [19] A. Yes, sir.

Q. What was the purpose then for asking him that particular question?

A. The purpose was the same as that of the former question relating to the witness' activities within a union.

Q. All right. Now half way down on page 6, referring to count 5, the question asked by yourself of Mr. Jackins, "Q. Were you at any time expelled from Lodge 751 of the Aero Mechanics Union?" Was that question asked by you of Mr. Jackins?

A. That was the same purpose. That was the same question.

Q. And did he refuse to answer that question?

A. He did.

Q. And your purpose was the same, you say, for asking that as the previous one? A. It was.

Q. Now if you refer to page 7 please and about a quarter of the way up from the bottom, the

(Testimony of Frank S. Tavenner, Jr.)
seventh count of the indictment, question by Mr. Clardy and I believe you identified him as being a Congressman on the Committee, is that correct?

A. Yes.

Q. This question was asked—was this question asked by Mr. Clardy of Mr. Jackins, "Is this something originated by the communist party as part of its program?" Was that [20] question asked by Mr. Clardy? A. It was.

Q. And did Mr. Jackins refuse to answer that question? A. Yes.

Q. What was the purpose, if you know, for this question being asked of Mr. Jackins?

A. The witness had prior to that time been asked a question relating to his present employment which he had answered but not fully answered and the question by Congressman Clardy taken from its context here in my judgment meant to draw out further facts regarding his present employment.

Q. Now you said that he had given an answer regarding employment. Is that answer found on this particular page? A. Yes, sir.

Q. Is that—could you direct our attention approximately where it is located on the page?

A. About one-fourth of the way from the top of the page you will see a number of asterisks across the page.

Q. Yes, sir?

A. Immediately under it is—appears the name Mr. Clardy and then the question follows: "Witness, you told us that at present you were engaged

(Testimony of Frank S. Tavenner, Jr.)

in an occupation that I didn't quite understand. What is it that you are doing at the moment?

"Mr. Jackson: I am engaged in the work of personal counseling."

The Court: I believe you said Jackson. You mean—— [21]

The Witness: Mr. Jackins, I beg your pardon.

Q. Then it continues on referring to that particular subject, is that correct? A. Yes.

Q. Now referring—directing your attention to page 8 of this Exhibit 7 and a quarter of the way down, a question by Mr. Clardy, was this question asked of Mr. Jackins by Mr. Clardy: "Who are the other people then when you use the word 'we' that are associated with you in this movement?" Was that question asked of Mr. Jackins?

A. It was.

Q. And did he refuse to answer that question?

A. He did.

Q. Can you state what the purpose for asking that particular question was?

A. That question, and I should have said in regard to the other question what I am proposing to say now, was also for the purpose of ascertaining facts relating to the man's identity and the business in which he was then engaged. So it was for the dual purpose of identifying the witness more definitely and it was also for the purpose of ascertaining what opportunities this witness had of knowing matters regarding which the Committee was interested in and at the moment I don't

(Testimony of Frank S. Tavenner, Jr.)
recall what else Congressman Clardy may have had in mind. To me that was what was the purpose of the question. [22]

Q. Still on page 8 about half way down, a question by Mr. Doyle. And is this Congressman Doyle who is also a member of the Committee at that time?

A. Yes, sir.

Q. Question was asked, "But what is the name of the group?" Do you recall that question being asked by Congressman Doyle of Mr. Jackins?

A. Yes, I did.

Q. And do you recall that Mr. Jackins refused to answer that question? A. Yes.

Q. And what was the purpose of asking this particular question? Was it similar to the one you just stated?

A. This was the same series of questions relating to the same matter.

The Court: Same group now referred to as——

The Witness: Yes, as the group with whom the witness was employed.

The Court: To which he had already made answer?

The Witness: Yes, sir.

Q. Now at the bottom of page 8, question asked by Congressman Doyle, "Does the group that you refer to have an office with you in the same office that you work in?" Do you recall that question being asked of Mr. Jackins by Congressman Doyle? [23] A. Yes, I do.

(Testimony of Frank S. Tavenner, Jr.)

Q. And do you recall Mr. Jackins refused to answer that question? A. Yes, sir.

Q. And was the group referred to here the same group that he previously mentioned and identified himself with over on page 7 when asked about his personal counseling service? A. It is.

Q. And that others were engaged in that business of service with him? A. Yes.

Q. And the purpose for asking this question was identical with the purpose previously announced for the preceding questions? A. Yes.

Mr. Harris: If your Honor will indulge me just a moment.

The Court: Certainly.

Mr. Harris: That completes my interrogation.

The Court: Cross-examination Mr. Barnett?

Mr. Barnett: Your Honor, I previously discussed with Mr. Harris the matter of introducing a more complete transcript of the hearing and I will have the witness identify them.

Mr. Harris: As the witness I think has already indicated Plaintiff's Exhibit No. 7 is not complete and I think if [24] counsel desires that the whole go in I have no objection.

The Court: Yes, is that what you have there?

Mr. Barnett: That is right, your Honor.

The Court: Have it marked as an exhibit.

Mr. Barnett: Before having it identified, your Honor, I would like to call attention to something I have done for convenience of counsel and the Court. I am going to have the witness identify

(Testimony of Frank S. Tavenner, Jr.)

portions of each pamphlet and in every pamphlet I have left a loose sheet so it will be easier to keep a record, but I am not making that a part of the record at this time.

The Court: The loose sheet will not be a part of the exhibit but let the exhibit be marked. If you have several of these why don't you have them all marked at one time, Mr. Barnett? It will save time.

Mr. Barnett: For purposes of identification, your Honor, I am offering what is called Part 1 of the Investigation of Communist Activities in the Pacific Area further entitled Hearings Before the Committee on Un-American Activities House of Representatives 83rd Congress, 2nd Session, June 14 and 15, 1954. Printed by U. S. Government Printing Office, Washington, 1954, with a number in the lower left-hand corner which is 48069.

With the Court's permission and permission of counsel I won't repeat that heading on all of them. [25]

The Court: It isn't necessary to do that. Let's put a tag on each one that you wish to offer.

Mr. Harris: Did you call that part 1 or part 2?

Mr. Barnett: Part 1.

The Court: Just a minute, gentlemen, get them tagged.

The Clerk: Defendant's Exhibits A-1 to A-5 inclusive have been marked for identification.

(Defendant's Exhibits A-1 to A-5 marked for identification.)

(Testimony of Frank S. Tavenner, Jr.)

The Court: Very well, if you wish to make a statement what these are then counsel can stipulate to it if he chooses to do so, Mr. Barnett.

Mr. Barnett: Very well, your Honor. Exhibits 1 to 5, your Honor, consist of pamphlets issued apparently by the Committee on Un-American Activities and I have already stated the title of them when I was starting to identify Exhibit 1, and they include testimony of different witnesses throughout the hearing and, as well as the more complete testimony of the defendant himself.

The Court: In other words, are they a complete record of the whole Committee hearings or just selected portions?

Mr. Barnett: They are, your Honor, as far as I can make out, a complete record of the hearings in the Seattle area. [26]

The Court: Yes, I am referring to the Seattle hearings.

Mr. Barnett: But some testimony was taken in Los Angeles and a few other places concerning the northwest. They are Communist activities in the Pacific Northwest.

The Court: Is that also included in your offer of exhibits?

Mr. Barnett: Included in the title, your Honor.

The Court: Very well, do you stipulate that the documents are what they purport to be?

Mr. Harris: Yes, your Honor, yes.

The Court: Do you offer them now?

Mr. Barnett: I offer them.

(Testimony of Frank S. Tavenner, Jr.)

The Court: Do you object?

Mr. Harris: No, your Honor.

The Court: Admitted.

(Defendant's Exhibits A-1 to A-5 admitted in evidence.)

Mr. Harris: One remark though. I assume counsel is only offering those portions of the Committee hearings contained in here as they refer to the defendant Jackins?

Mr. Barnett: I am referring to such portions as they pertain to the defendant Jackins together with such portions referring to the defendant Jackins.

Mr. Harris: Yes, that is what my—no objection as [27] to that. I don't think the materiality as to other matters—you are not offering those anyway.

Mr. Barnett: Not aside, your Honor——

The Court: That is the way I understood it. However, if you intend it for any broader purpose you should state that now.

Mr. Barnett: There was only one other broader purpose your Honor which I will come to rather quickly. I am intending to show by these pamphlets, your Honor—I don't want to take time to locate it now—that the setting, there is a reference by the Chairman and I think Mr. Tavenner will probably testify to the setting and I will just proceed and ask him questions regarding the setting.

The Court: Very well, go ahead.

(Testimony of Frank S. Tavenner, Jr.)

Cross-Examination

By Mr. Barnett:

Q. Mr. Tavenner, at the time these hearings were held in Seattle, where were they held?

The Court: Doesn't that appear from the transcript? That appears from the transcript, doesn't it?

Q. (Continuing): In the county chambers in the County-City Building, County Commissioner chambers, I believe?

A. Just one moment please, sir. In room 402 County-City Building, Seattle, Washington. [28]

Q. And at the time the hearings were going on there were, there was radio apparatus there, was there? A. There was television apparatus.

Q. And do you recall whether there was radio too?

A. I have no knowledge of the radio. I am not saying that there was not. I have no knowledge of it.

Q. And there was camera apparatus?

A. Yes.

Q. And there were flash bulbs going off while pictures were being taken? A. Occasionally.

The Court: The newspaper people tell me they can do it without that now.

A. (Continuing): The Chairman announced at several times that still photographers should take their photographs before the witness began his testimony and my recollection is that still photog-

(Testimony of Frank S. Tavenner, Jr.)

raphers had flash bulbs and in the taking of the still pictures did flash the bulbs, but that was prior to the witness beginning to testify except probably in one or two instances during the whole period of the testimony. Some photographer stepped out of turn and was immediately told by the Chairman that he should not take pictures while the witness was on the stand.

Q. Now calling your attention to a pamphlet number 1 which is Exhibit 1, does the Court wish to follow the exhibit, your Honor? [29]

The Court: Yes, if you have—thank you.

(Whereupon, exhibit was handed the Court.)

Q. (Continuing): And to page 5987 on the bottom half of the page, there is testimony by Howard Costigan, isn't there? A. Yes, sir.

Q. And calling your attention to the bottom of that page and the answer by Mr. Costigan there is a reference by Mr. Costigan as follows: "Jess Fletcher appeared before the District Bureau on several occasions. He was never a member of a District Bureau but I was conscious of the fact that he was an important member of the communist party in the labor movement. He was vice president of the BSEU." Now, Mr. Tavenner, do you know the BSEU is the Building Service Employees Union?

A. I do not know it, but the initials seem to bear it out.

Q. Well, calling your attention to page 6 of,

(Testimony of Frank S. Tavenner, Jr.)
with reference to count number 5 about which you previously testified under examination by Mr. Harris, near the top of the page is a question by yourself, "Were you also expelled as business agent of the Building Service Employees Union sometime prior to 1948." Would that be some of the prior information in the records of the Committee on the basis of which you wished further information from the defendant?

A. What is your question?

Mr. Barnett: Would you read the question? [30]

(Whereupon, the reporter read back the question as requested.)

A. You mean as to whether or not the Committee had information that he had been expelled, is that——

Q. Yes, and affiliation with this union?

A. I was aware at that time, at the time of examining this witness that there was a newspaper article which stated that he had been so expelled.

Q. While in the broad sense of the question, Mr. Tavenner, the fact that that information was in the files of the Committee and in the record would give it a basis for further interest in this defendant as identified by Howard Costigan with the Building Service Employees Union?

A. I had not connected Mr. Costigan's testimony with this matter in any way.

Q. Well I am referring to the Committee's having that knowledge just as a part of its records.

(Testimony of Frank S. Tavenner, Jr.)

A. The only knowledge that the Committee had that I know of relating to this witness' connection with that specific organization was the newspaper article to which I referred.

Q. On the same pamphlet, page 6004 about two-thirds, no almost at the bottom of the page, Mr. Tavernner, I call your attention to the name Harvey Jackins. Do you find it?

A. Yes, I see it. [31]

Q. And I will ask if at the time these hearings were being held in Seattle, whether you were examining the witness Elizabeth Boggs Cohen, or does it appear to be Mr. Wheeler?

A. This examination was conducted by Mr. Wheeler, an investigator of the Committee.

Q. And Elizabeth Boggs Cohen had been identifying communist members? A. Yes.

Q. During the course of this testimony?

A. Yes, that is correct.

Q. And she was asked to continue and does so at page 6004 and identifies Harvey Jackins as a youth leader? A. Yes.

Q. Was that used by you, Mr. Tavenner, as a basis for questioning the defendant with reference to, particularly to the following counts: Count 1?

A. I had that knowledge that this testimony had been given before the Committee and also the knowledge that another witness had identified the witness as having been a member of a group of the Comunist party at the University of Washington, and this witness here who testified, Mrs. Cohen had,

(Testimony of Frank S. Tavenner, Jr.)
according to my recollection, been a member of the communist party while at the University of Washington, and that was prior to 1935 according to my recollection, and those facts were within my knowledge at the time that this witness was examined, though [32] I asked him no questions about it.

Q. That was a part of the purpose in asking him the first question as to telling the Committee please briefly what your employment record has been since 1935?

A. No, sir, my questions related to a period subsequent to that.

Q. Since 1935? A. Yes.

Q. Now calling your attention to the same pamphlet, page 6027, the testimony of Leonard Basil Wildman, can you tell from the record who is conducting that examination?

A. Mr. Wheeler, an investigator for the Committee.

Q. Now just about the very center of the page I believe there occurs a question from Mr. Wheeler, "Well, now, who were the other leading people in the YCL?" Is that right?

A. That is correct, sir, and may I explain the form of answer that I gave? This was the testimony that I was referring to when I said information was available about the witness' membership in the communist party. I notice it is the Young Communist League instead of the communist party and I desire to correct my testimony accordingly.

Q. This was the testimony of Leonard Basil

(Testimony of Frank S. Tavenner, Jr.)
Wildman and he had identified himself as a former communist, had he not?

A. That is correct. [33]

Q. And in answer to one of Mr. Wildman's question said there was a young fellow by the name of Harvey, not Jackson, and Mr. Wheeler spelled it out for him letter by letter, is that correct?

A. That is correct.

Q. Then he said, "Jackins I think it was, Jaulkins, or something like that." Now at the bottom of that page Mr. Wheeler asked a further question, "Who was the organizer for the University Branch, do you recall?" And Mr. Wildman answered Harvey Jackins was. Is that correct?

A. That is correct.

Q. And you—that was the testimony you had in mind a minute or two ago when you testified?

A. Yes.

Q. Directing your attention to what is called part 2 of the testimony of Barbara Hartle at page 6091, this testimony was conducted by Mr. Kunzig, I believe, was it not? A. Yes, sir.

Q. And I call your attention to just a little bit above the half-way point to Mr. Kunzig's question to Mrs. Hartle. "I see, go ahead if you will please." And her answer, "Harry Fugo. I knew him as a member of the communist party in the early 1940's. He was a member, an officer of the Building Service Employees' Union and lived in the north Seattle area." Now I believe Barbara Hartle had admitted her communist [34] connections with activities in

(Testimony of Frank S. Tavenner, Jr.)

the northwest? A. Yes, she had.

Q. And she had done it somewhat voluminously or in great quantity, Mr. Tavenner?

A. Yes, during the course of the hearing she testified at considerable length.

Q. And this identification of the Building Service Employees Union and Mr. Fugo as a member of it, was that within the purpose of the Committee in asking the questions set forth in the counts regarding the Building Service Employees Union?

A. I see no connection whatever between Harry Fugo's membership in this union and that of the witness'.

Q. That wasn't quite in my mind, Mr. Tavenner. I am going to bring that out to the Court a little later, but I mean the Building Service Employees Union became known to your Committee as a source for active communists, did it not?

A. No, sir, I didn't know that it had at all.

Q. I see, but that information is in the record of the connection of numerous communist people such as testified to by Mr. Costigan regarding Jess Fletcher, people identified as communists by Barbara Hartle?

A. You have called my attention to two instances where persons who were known to be members of the communist party were members of that union. If there were others I am not aware [35] of it presently.

Q. On page 6092 I will ask if there is not set forth therein further testimony by Barbara Hartle,

(Testimony of Frank S. Tavenner, Jr.)

if you wish to examine that page, identifying Mervin Cole as a communist and district board member and officer of the Building Service Employees' Union? A. That is correct.

Q. And on page 6094 I will ask you if, just a little bit above the middle of the page Mrs. Hartle under examination by Mr. Kunzig makes this answer, "The Building Service Employees' Union Local 6 was for a long time completely communist-dominated. High offices have been held in this union by George Bradley, William K. Dobbins, Mervin Cole, Ward Coley, Jess Fletcher, all of whom I knew to be communist party members at the time that they held these offices."

That appears therein? A. Yes, sir.

Q. On part 3, at the page 6148 just near the bottom of the page I will ask if under further examination by Mr. Kunzig Mrs. Hartle makes the answer, "One carrier who made several contacts while Ralph Hall and I were in Tacoma was William K. Dobbins." "And you knew him to be a member of the communist party?" Question by Mr. Kunzig. And the further answer by Mrs. Hartle, "Yes, I knew him to be a member of the district board and the district committee of the communist party." [36] Then Mr. Kunzig asked, "Can you give us any further identification, any address or anything of that nature," to which Mrs. Hartle answers, "He lived in the Ballard area and was an officer one time of the Building Service Employees Union Local 6." Is that set forth therein?

(Testimony of Frank S. Tavenner, Jr.)

A. Yes, that is correct.

Q. Did you have available to you at the time of your investigations here the records and files of the Canwell Committee?

Mr. Harris: If your Honor please, I am going to object so we don't get off on collateral issues.

The Court: What is the purpose of that inquiry?

Mr. Barnett: To show, your Honor, that as part of the purposes of the investigating committee they were following further information which they had received from other sources and I am prepared to, if the witness answers yes, your Honor, I am prepared to have him identify references to Harvey Jackins in the official Canwell Committee publications. If he answers no or he doesn't recollect, I will probably offer the same evidence to the Court, not as strict evidence receivable under rules of evidence, but under the Alexander case as a showing to the Court for reasonable apprehension from whatever sources are available and I don't particularly care in which way the Court receives the evidence.

The Court: In a sense then the matter is cumulative of [37] what you have already shown, isn't it?

Mr. Barnett: Beg your pardon, your Honor?

The Court: In a sense at least it is cumulative of what you have already shown, isn't it?

Mr. Barnett: Yes, your Honor.

The Court: I think for the present I will sustain the objection unless there be some further development in the situation that indicates otherwise. We had better try one case at a time.

(Testimony of Frank S. Tavenner, Jr.)

Mr. Barnett: Exhibit number 7, can you find it for me?

The Witness: I believe it was handed to me.

The Court: 7 was the transcript?

Mr. Barnett: Yes, the citation transcript.

Q. I call your attention to the first page of the transcript, the opening page entitled Reports Citing Carl Harvey Jackins.

Mr. Harris: I have a copy, if the Court desires.

Mr. Barnett: I am sorry, your Honor.

The Court: May I keep this tentatively then?

Mr. Harris: Yes.

Q. (Continuing): I want to call your attention to the fifth line, to the phrase "cause to be issued a subpoena to Carl Harvey Jackins, residence—" certain address, "—occupation Dianetics Institute, 2327 Fourth Avenue." I will ask if the [38] Committee did not have this information already in its files before the, before it called Harvey Jackins as a witness?

A. That information must have been obtained from an investigator of the Committee and for the purpose of serving the subpoena. Just a moment. Yes, sir, that is correct.

Q. And in the last paragraph setting forth the actual subpoena that went forward to the Seattle Police Department it sets forth the same information, does it not, near the bottom by way of repetition? A. Yes, sir.

Q. Now those in effect are really the same questions as you set forth, that is the request—strike that

(Testimony of Frank S. Tavenner, Jr.)

will you Madam Reporter? In effect then in Count 9 when you ask for the name of the group you had it there, did you not Mr. Tavenner, the Dianetics Institute?

A. Yes, that asked the witness to identify the name of the group with which he was associated.

Q. And on——

A. Whether that is the same as his address or not could be a question.

Q. Well, on Count 10, "Does the group that you refer to have an office with you in the same office that you work in?" You had the address of that group, didn't you?

A. We had his address and that is all.

Q. But you did have information in the files of the [39] counsel before that subpoena was sent out showing his occupation? A. No, sir.

Q. What is the abbreviation in the two paragraphs I pointed out to you which have Occ. Doesn't that mean occupation?

A. Where do you see that?

The Court: Down in the text of the subpoena, third line down.

A. (Continuing): I don't know what the abbreviations mean other than that it was his address.

Q. Calling your further attention to the transcript number 7, page 5 thereof, at the bottom of the page, to your statement to the Chairman, Mr. Tavenner, it states, "Mr. Chairman, it was my intention to inquire of this witness as to what knowledge he had regarding Communist Party activities

(Testimony of Frank S. Tavenner, Jr.)
in connection with unions of which he was a member or had official positions with, but the witness has refused to answer that he was even a member of the first union that I mentioned. I think, however, that having asked that question I should follow it up even if I do not pursue the others."

Now Mr. Tavenner, your questions then with reference to his occupation and his employment were to seek what knowledge he had regarding Communist Party activities?

A. It was to find out what knowledge he had regarding [40] Communist Party activities, yes.

Q. You weren't particularly interested in his identification were you? A. At that point?

Q. Yes, at that point.

A. Well, I would say that was part of it. Certainly not the main objective at that time.

Q. Well, as a matter of fact, in the fuller portions of the testimony in part 4 I believe it is, calling your attention to page 6236, question by yourself, you were questioning there, Mr. Tavenner, after Mr. Velde had sworn the witness and you asked Mr. Jackins a lot of questions concerning his identity, where he was born and when he was born, where he resided and the number of years he had been there and his training and when he had been to the University and all of that was by way of identification, was it not? A. Yes, it was.

Q. When you get to the question of his employment records since 1935 you were then interested in his union and employment record, were you not?

(Testimony of Frank S. Tavenner, Jr.)

A. Yes, we were.

Q. And in his connection with Communist activities?

A. Yes, and also the matter of further identification of him.

Q. And the same thing applies, does it not, Mr. Tavenner, [41] does it not, to all counts up to and including Count 6, namely that you were interested in his knowledge concerning Communist activities?

A. That was part of it, yes, sir.

Mr. Barnett: Excuse me, your Honor, a moment.

The Court: Certainly.

Q. May I call your attention to Count 6, question, "Were you at any time expelled from Lodge 751 of the Aero Mechanics Union?" with reference to testimony received by the Committee concerning that union appearing in part 2 at page 6093 and this concerned further testimony by Mrs. Hartle, and on page 6093 about half way down I will ask you if she does not make this statement, "The Aeronautical Industrial District Lodge No. 751, which is often known as the Boeing Union. According to my knowledge there was no Communist influence in it, no Communist domination of this union to my knowledge." Then she proceeds. "Mr. Kunzig: Do you mean that this is a situation then perhaps when a union innocently backs this type of organization without knowing what it was like or without having any information about its true aim? Mrs. Hartle: Yes, I believe that that was the case. I was quite well acquainted with the Communist Party influence

(Testimony of Frank S. Tavenner, Jr.)
in the Aero Mechanics, being assigned to aircraft concentration work, and I am quite certain there was very little Communist Party influence in it." That statement is in the files of the Committee? [42]

A. Yes.

Q. Now on part 3, page 6160, at the bottom of 6160 where you are now examining, Mr. Tavenner, and you state to Mrs. Hartle, "Since you have mentioned your work in that respect, I believe you have touched on it already in your testimony, where was that work centered in the aircraft industry?" To which she answered, "The South King region of the Communist Party through a district decision had as its assignment concentration on the Boeing Aircraft Company workers to attempt to gain members and influence among the Boeing workers, and specifically in the Aero Mechanics Union of course as the method of doing that."

And you ask, "The employees in that plant were not confined to a particular union, were they?" And Mrs. Hartle answers, "There is one main important union, Aero Mechanics, but it was possible to recruit many other persons in the Communist Party who were not in that one main local."

And continuing to the top of the page 6161 you asked a question, "Will you tell the Committee please to what extent, if any, the Communist Party was successful or unsuccessful as the case may be, in its efforts to infiltrate that plant?" And she answered, "Well my estimate of it, and I am certain that that was the estimate of the whole district

(Testimony of Frank S. Tavenner, Jr.)
leadership of the Communist Party, was that during the period of late 1947, 1948 and 1949 at the time I was organizer in [43] that region, that the efforts were almost entirely unsuccessful; from any standpoint of influence or success you would have to say there was no success."

A. Yes, sir, I recall that testimony very well and she testified that efforts were unsuccessful in that area.

Mr. Harris: If your Honor please, I'd like to register objection to the reading that commenced on page 6161 with the question by Mr. Tavenner and the answer by Mrs. Hartle because as I read it it relates to no information contained in the counts on which this case is being tried, and I believe if I don't register an objection and ask that it be stricken from the record that then I may have waived the right and counsel may go into further matters unrelated to this particular charge, and that is why I raise it at this time.

The Court: Well, the motion will be denied.

Q. With further reference to page 6161 and without intending to read entirely therefrom, your Honor, just to save a little time, the rest of that page is already in the record, but it goes further into her comments regarding the efforts of the Communists to infiltrate the Boeing Airplane Company, does it not? A. Yes, sir, it does.

Q. Now I related all of this as I asked my question of you to count number 6 and ask you if that was not the information you had in mind when you

(Testimony of Frank S. Tavenner, Jr.)

were directing this question to [44] the defendant, count number 6?

Mr. Harris: Does counsel have before him what count number 6, I mean the witness, of what count number 6——

The Court: The count number 6, the question there, Mr. Tavenner, is, "Were you at any time expelled from Lodge 751 of the Aero Mechanics Union?"

A. Yes, will you give me just one moment to examine this record. The testimony which you have called my attention to in part 3 given by Mrs. Hartle was given several days after the testimony of the witness in this case, Mr. Jackins, and therefore at the time of his examination these facts were certainly not in my knowledge and as far as I know were not in the possession of the Committee. In other words, the testimony that you are referring to on page 6160 and 6161 was given on June 16th where the witness in the present case appeared on June 14th.

Q. Well, accepting that for the moment as true, Mr. Tavenner, where then did you learn he had been expelled from Lodge 751?

A. As I mentioned earlier in my testimony, I had seen it in a newspaper article.

Q. Didn't you take testimony from Barbara Hartle in executive session? A. Yes.

Q. Is it possible that that may be in the secret and [45] confidential files which under the rule of the Committee are not necessarily published?

(Testimony of Frank S. Tavenner, Jr.)

A. I took executive testimony of Mrs. Hartle myself and I had no knowledge of that until she testified to it in public session.

Q. Well, that newspaper article then was in the files of the Committee?

A. The newspaper article I am not sure from what source I obtained it.

Q. But it is now in the files of the Committee?

A. It may be.

Q. Now I call attention to part 3——

Mr. Barnett: I don't think I made an excerpt of this counsel or your Honor by way of additional typed copy.

Q. (Continuing): ——page 6232. I believe you were examining Barbara Hartle. Have you found it? A. Yes, sir, I have.

Q. You were examining Barbara Hartle and at the, little bit below the half way mark while she is testifying I believe she was answering your question, was she not, at top of page 6232, "Will you describe please to the Committee the type of control the Communist Party sought to exercise over its members?" That was the question you asked, Mr. Tavenner? A. Yes, sir.

Q. And as part of a long answer at the very [46] last sentence of what looks like the third from the bottom paragraph it says as follows, does it not, "When Harvey Jackins was expelled I heard a discussion seriously held as to what his wife would do, go with him to the enemy or stay with the party. The Jackins have three or four children." You

(Testimony of Frank S. Tavenner, Jr.)
asked that question and that answer was partly given? A. That was part of her answer.

Q. Now Mr. Tavener, with reference to count 8 you answered prosecution's question as to the purpose of that question stating that you wanted to see what other matters that the Committee was interested in concerning communism which the witness might know. Now count 8 refers to the question, "Who are the other people then when you use the word 'we' that are associated with you in this movement?" Then you made the statement that you don't recall what Mr. Clardy had in his mind. Now is it possible, Mr. Tavenner, that a member of the Committee might have something in his mind other than the purpose of the Committee in exploring for information affecting the real purpose of the Committee? A. I have no prior——

Mr. Harris: If your Honor please, just a moment. As to the form of that question I believe it is objectionable in its present form because I think counsel makes the statement that you were asked this question and what was the purpose and you stated the following was the purpose and then [47] proceeds with his question. I think probably it should be referred whether or not that was the witness' recollection as to what he stated.

The Court: Yes, I see there is a possible objection to the form there.

Mr. Barnett: I will restate it, your Honor.

The Court: Inadvertently undoubtedly. It occurs from time to time. Maybe if you will rephrase it.

(Testimony of Frank S. Tavenner, Jr.)

Mr. Barnett: Be glad to.

Q. Did you make the statement that you didn't know what Mr. Clardy had in his mind with reference to the question on count 8?

A. I don't think so. My recollection is that I stated at least two things and stated——

Q. Excuse me witness, I am not asking you now what you stated yourself, but whether or not you now deny or wish to correct that you did not state or did you state that you don't recall what Mr. Clardy had in his mind?

A. That was only part of what I said and I can't——

Q. I am asking just as to that part—counsel objected to me reciting the entire statement as to what you said.

Mr. Harris: No, I didn't object——

The Court: Now gentlemen, it is not clear to me where we are getting. Start over again. Ask a question.

Q. Did you, as part of your answer state that you did [48] not recall what Mr. Clardy had in his mind with reference to the question represented by count 8 to wit, "Who are the other people then when you use the word 'we' that are associated with you in this movement?"

A. My recollection is that I stated I did not know what other matters he had in mind after having stated at least two things that he had in mind.

The Court: That is my recollection of what he said, too.

(Testimony of Frank S. Tavenner, Jr.)

Mr. Barnett: That is all right, your Honor.

Q. Now Mr. Tavenner, how were you able to state the other purposes that he had in mind?

A. I stated I didn't know other purposes that he may have had.

Q. Now you stated some purposes and said he might have had other purposes.

The Court: What he want to know, how did you know that? A. The ones that I did testify?

The Court: Yes.

A. (Continuing): I think I made it clear that that was my judgment of what he had in mind from my experience in asking of such questions. I didn't ask him what he had in mind.

Q. It is possible that he had in his mind no [49] purpose of the Committee represented by your judgment?

A. No, sir, not with my judgment, no, sir; no, sir, I have no reason whatever for thinking that he was not asking the question in good faith.

Q. Now with reference to counts——

Mr. Barnett: Your Honor, may I ask the Court to inquire if there are witnesses here from the Seattle Times and the Seattle Post-Intelligencer?

The Court: Are there witnesses here from the local newspapers? Persons subpoenaed to testify?

(No response.)

Apparently not.

Q. With reference to counts 1 to 6, Mr. Tavenner, we have gone over a lot of information in the

(Testimony of Frank S. Tavenner, Jr.)

record and you have testified that you had other information such as the newspaper article to show why you were interested in this witness. Will you please indicate what information you had that showed that there was anything pertinent about, behind the question represented by count number 7?

A. Will you identify that count to me as the one involving the question, "Is this something originated by the Communist Party?"

Q. That is right, yes.

A. I am sorry, I——

Q. Did you have——[50]

The Court: The question is what was the pertinency of that, words to that effect.

A. Well, the pertinency——

The Court: Pretty much on the self-explanatory on the face of the question.

A. (Continuing): I think it is self-evident from the question.

The Court: I would think so too.

Q. Well, I believe that you had previously stated on direct examination that the reason that that question was asked because it followed a long answer which the defendant had voluntarily given. What was there in his long answer voluntarily given that suggested anything about communism?

Mr. Harris: There again we have the same situation with the type of question that I asked before and I object to its present form assuming that this is what he testified to. My recollection may be dif-

ferent, but I think the witness should be asked if he did so testify.

The Court: Yes, maybe we wouldn't get into the difficulty we got in last time.

Q. (Continuing): Did you previously testify, Mr. Tavenner, that count 7 was, a question represented by count 7 was asked because the witness had previously given a long answer as to his occupation?

A. Yes, I stated that it was. [51]

Q. Well what about that answer in any way indicated the pertinency of asking that question with reference to his answer?

A. The witness had stated the type of business in which he was being employed and this was, as I testified, a series of questions relating to that type of employment which he was referring to and as to which he refused to answer certain questions and elicited finally the question by the, by Mr. Clardy as to whether or not the group was in any way connected, that the work was in any way originated by the communist party as part of its program.

Q. Now I call your attention to, page 7 of exhibit 7, at the bottom of the page following his long answer and to the top of page 8 where that question is set forth again near the top as Mr. Harris pointed out. Do you find the question, "Who are the other people then when you use that word 'we' that are associated with you in this movement"? Is that the——

Mr. Barnett: Excuse me, your Honor, I'd like to ask Mr. Harris a question.

The Court: Certainly, of course.

(Testimony of Frank S. Tavenner, Jr.)

(Whereupon, Mr. Barnett conferred with Mr. Harris.)

Q. (Continuing): I want to call your attention to Exhibit 7 and ask you if there were not two questions asked [52] at that time, and the last half of the dual question set forth at the count?

A. That is correct.

Q. And the first part is, "What do you mean by 'we,' is this something originated by the communist party as part of its program"?

A. Yes, sir, and the part before.

Q. So that really comes out of the answer to the question?

The Court: Same question is asked on the next page separately.

The Witness: That is right.

The Court: So if there is any magic in that it isn't very important because the thing is asked separately on the next page.

Mr. Barnett: Well in effect then, your Honor, there is, 7 and 8 are really one count.

Mr. Harris: I don't think, if your Honor please, that is something we ought to——

Mr. Barnett: I didn't mean I intend to but I was having difficulty correlating the two.

The Court: I shouldn't have interrupted you Mr. Barnett. Explore the reason briefly, not at too great length.

Q. (Continuing): My question was that the first part [53] of count 7 of that question being elim-

(Testimony of Frank S. Tavenner, Jr.)

inated the "we" referred specifically to the long answer then, did it not? A. Yes, sir.

Q. And the last part of it was the interjection of communism by Mr. Clardy?

A. That is correct.

Mr. Barnett: Your Honor, I had asked witnesses from both papers to be here about two-thirty and they should be here now and——

The Court: Are there any witnesses from the Post Intelligencer or Seattle Times now in attendance? Let's go ahead, Mr. Barnett.

Mr. Barnett: Your Honor, Mr. Morrow forgot to bring photostats with him that I served upon him with a subpoena to compare with the originals, so he is no use to me now.

Mr. Harris: I might make this one——

The Court: Go ahead with interrogation of the witness and get this witness concluded please.

Mr. Barnett: Now if the Court please, we desire to offer by stipulation the record of the proceedings to be played to the Court and have Mr. Tavenner identify the proceedings as being a true reproduction. Mr. Harris and I played it over in his office Thursday or Friday and ——

The Court: What is the point of it? Why are you having [54] that done? What am I going to get out of that that I can't get from reading it?

Mr. Barnett: You are going to get out of that, your Honor, something about the setting. Now the fact that the government——

The Court: I don't mind, you know, but I don't

want to go through that if, unless there is some point in it, you see.

Mr. Barnett: I very especially would like to have the Court hear it because it is our complete second phase of defense to the last four counts in case the Court holds that they are pertinent, rests on the Court's hearing that record to determine the setting, the rapidity of the questions.

The Court: All right, I will hear it. About how long will it take?

Mr. Barnett: About forty minutes.

The Court: We won't be able to do that today. Have you concluded other than that with this witness?

Mr. Barnett: Other than that question, your Honor.

The Court: All right, you can stand down unless you have some redirect?

Mr. Harris: No, I would think this though, if your Honor please, I think counsel "hit the nail on the head" when he said it was a matter of defense, and I think it probably would be improper on cross-examining and I might advise [55] counsel I have heard it and I will stipulate that the only question he wishes to ask Mr. Tavenner about the authenticity I will stipulate to that.

The Court: You stipulate its authenticity then; you don't need this witness any further, do you?

Mr. Barnett: No.

The Court: He isn't going to make a running commentary on it or anything like that? You think I could gather it without that, do you?

(Testimony of Frank S. Tavenner, Jr.)

Mr. Barnett: That is right, your Honor.

The Court: You will be excused from the witness stand, Mr. Tavenner.

Mr. Harris: And I have no redirect examining.

(Witness excused.)

The Court: Nothing further. Do you have anything else?

Mr. Harris: No, and at this time I'd like to announce that the government rests.

The Court: Very well. Are you ready to go forward, Mr. Jackins, or Mr. Barnett?

Mr. Barnett: I am ready to go forward, your Honor, in terms of submitting evidence on reasonable apprehension some of which——

The Court: Anything you want to put in that is admissible you are free to do. Go to it. [56]

Mr. Barnett: This, of course, your Honor, is in rebuttal to the prosecution's case rather than by way of defense.

The Court: Well, the government has rested. Anything you have that you wish me to hear now bring it on. I will hear this recording at a time that is convenient considering we have to empanel a jury in another case and so on in a few minutes. That is why I am not hearing it right now, but if you have some other material thing, go ahead with it. Would it convenience you if we took a recess?

Mr. Barnett: I'd appreciate it.

The Court: If we take a recess we are likely to recess for quite a little while because I am going to

empanel a jury in another case at three o'clock and probably would take an hour, I would think, or maybe thirty, forty minutes at least.

Mr. Barnett: I would appreciate that, your Honor, because it would allow this reporter to go back and get my photostats.

The Court: How much time will you take for the rest of your case not counting the record?

Mr. Barnett: Outside of the record, your Honor, possibly an hour and if argument is going to take place after the Court has received the evidence, possibly sometime tomorrow. [57]

The Court: Yes. Well, I think it would be more——

Mr. Barnett: I would even make this offer, that because of the stepping up of the date of this trial from the 15th which was agreed on before Judge Lindberg, I lost one day in photostating all the Canwell stuff and if I gave that to them tonight, I can have it photostated and put it in tomorrow.

The Court: Here's what we will do. I think it will meet everyone's convenience. We will adjourn this case over now until tomorrow morning at nine-thirty, tomorrow morning at nine-thirty, at which time we will go forward with this present case. In the meantime is that agreeable to all of you?

Mr. Harris: Yes, your Honor.

The Court: You think it would take about an hour not counting the record playing?

Mr. Barnett: That is right, your Honor.

The Court: About forty minutes for the record playing?

Mr. Barnett: Yes, your Honor.

The Court: Better put the Starkovich case over until following lunch. Then we will be sure to conclude this case. This case will be recessed now until tomorrow morning at nine-thirty a.m. The Court will recess until approximately three o'clock when the parties and counsel are ready to [58] proceed empanelling of the jury in the Starkovich case.

(Whereupon, the instant case was recessed at two-forty-five o'clock p.m. and other matters were considered.) [59]

March 15, 1955

The Court: We are now prepared to proceed with the case of United States vs. Jackins. Are you ready, Mr. Barnett?

Mr. Barnett: The defendant is ready.

Mr. Harris: The government is ready.

The Court: We will proceed with that case now. I think we are at the point of the government having rested. Yes.

Mr. Harris: That is my recollection.

The Court: The government had rested and you had a record of some kind you wanted me to hear, I think, and also had some testimony.

Mr. Barnett: Some testimony.

The Court: I think it would be more convenient if you'd offer the testimony since we can attend to the record at any time that is convenient to us and it may convenience witnesses to be heard and disposed of, don't you think so?

Mr. Barnett: Yes, I do, your Honor, and thank you very much.

The Court: Present any other proof that you have. [62]

ROBERT A. MORROW

being first duly sworn on oath, was called as a witness on behalf of the Defendant and testified as follows:

The Clerk: State your full name and spell your last name.

The Witness: Robert A. Morrow, M-o-r-r-o-w.

Direct Examination

By Mr. Barnett:

Q. You are also known as Bob Morrow?

A. Yes, that is correct.

Q. And you were served with a subpoena to appear in court this morning, Mr. Morrow?

A. Yes, I was.

Q. Will you state your address please?

A. 2155 North 100th.

Q. In Seattle? A. Seattle.

Q. Washington. And your occupation?

A. Clerk in the library of the Post Intelligencer.

Q. And did you bring with you some documents at my request? A. Yes, I did.

Q. What do they consist of generally before you identify them?

A. They are photostats of stories that have appeared [63] in the Post Intelligencer.

Q. Would you please hand them to me.

(Testimony of Robert A. Morrow.)

Mr. Barnett: Will you mark these for identification please.

The Clerk: Defendant's Exhibit number A-6 to A-9, both numbers inclusive, have been marked for identification.

(Defendants Exhibits number A-6 to A-9 marked for identification.)

Q. Mr. Morrow, did you at my request compare the Exhibits 6, 7, 8 and 9 with the originals of the articles in the Seattle-Post Intelligencer of which they are photostatic copies?

A. Yes, I did.

Q. And were they true copies?

A. Yes, they are.

Mr. Harris: I might say to the Court that I agree with Mr. Barnett that if such a witness did identify them as being true copies of the original.

The Court: Yes, no question about their being correct copies.

Mr. Barnett: I offer these in evidence, your Honor, for the purpose of showing reasonable apprehension as to the dates specified.

The Court: Are they all articles that preceded June 14th? [64]

Mr. Barnett: Yes, they are your Honor, except——

The Court: If there is anything that came out after June 14th it couldn't possibly have any bearing, could they?

Mr. Barnett: Yes, they are, your Honor.

(Testimony of Robert A. Morrow.)

The Court: Yes.

Mr. Harris: I object to them, your Honor. I assume, I don't know how old they are, but let's see if we can identify A-6. 1941.

The Court: I wouldn't take time to make too lengthy a point on it. Your objection may be entered and you state your ground.

Mr. Harris: It is too far removed from the actual setting because in reference to A-6 the date of the article is March 28, 1941. That is some fourteen years removed from the actual hearing here in question.

The Court: Mr. Jackins was about eleven years old at that time, something like that. No, it is the other gentleman.

Mr. Barnett: Would the Court like to hear my answer to the objection?

The Court: No. Here is what I propose to do. Being a non-jury case and the Court presuming to have judgment enough to differentiate what is material and what is not, I am going to admit it. Let it in and I will consider it fully when we have more time to give attention to it. [65]

(Defendant's Exhibits A-6 through A-9 admitted in evidence.)

Mr. Barnett: That is all I have of this witness.

The Court: Any cross?

Mr. Harris: No, your Honor.

The Court: That is all, Mr. Morrow. Call another.

Mr. Barnett: I'd like to call the representative from the Times. [66]

CHARLES H. TODD

being first duly sworn on oath, was called as a witness on behalf of the Defendant and testified as follows:

The Clerk: State your full name and spell your last name?

The Witness: Charles H. Todd, T-o-d-d.

Direct Examination

By Mr. Barnett:

Q. What is your address, Mr. Todd?

A. 709-14th Avenue North, Seattle.

Q. And are you connected with the Seattle Times?

A. I am Secretary of the Seattle Times.

Q. And were you served with a subpoena in this cause? A. I was.

Q. And did you at my request bring with you certain documents? A. I did.

Q. What do those documents purport to be?

A. They are two photostats of copies, portions of copies of the Seattle Times.

The Court: Here again I assume they are conceded to be copies of the originals?

Mr. Harris: Yes, your Honor.

The Court: All right.

Mr. Barnett: There is, however, one matter

(Testimony of Charles H. Todd.)

your [67] Honor I should call to your attention that one of these reprints is dated June 14th, the day of the hearing and it is being offered because it shows the testimony of Barbara Hartle and the mentioning of Harvey Jackins.

The Court: Well, I have grave doubt whether that would have any bearing, but I am going to admit it and we will consider it more fully when we come to the argument.

Mr. Harris: I wish a similar objection.

The Court: Yes, same objection overruled. Exhibits are admitted. Anything further from Mr. Todd?

Mr. Barnett: These can be one exhibit, your Honor.

The Court: Yes.

The Clerk: Defendant's Exhibit A-10 has been marked for identification.

The Court: And admitted in evidence.

(Defendant's Exhibit number A-10 marked for identification and admitted in evidence.)

Mr. Barnett: Nothing further from Mr. Todd.

The Witness: May I be excused, your Honor?

The Court: You may. It's a shame to let newspapermen go with so little cross-examination.

The Witness: I am disappointed myself.

The Court: Each of you gentlemen may leave at your pleasure. Call another please. [68]

Mr. Barnett: If the Court please, I have some further evidence to present to the Court by way of

(Testimony of Charles H. Todd.)

exhibit identification. Will you mark that please as one exhibit.

The Clerk: Defendant's Exhibit A-11 has been marked for identification.

(Defendant's Exhibit A-11 marked for identification.)

Mr. Barnett: Will you pass that to the Court please.

Your Honor, this is offered by the defendant as photostatic copies of what it purports to be, namely photostats of Washington Public Document Volume 3 which I obtained on loan from the State of Washington State Library. They are down to their last three copies and couldn't let me have one to put into Court and I have just very quickly reviewed some of the pages with Mr. Harris and I don't know whether he cares to stipulate these are exact copies, but under the showing——

Mr. Harris: I so stipulate.

Mr. Barnett: Thank you, your Honor.

The Court: These are stipulated to be copies of certain public documents of the State of Washington relating to the so-called Canwell investigation, is that right?

Mr. Barnett: Yes.

Mr. Harris: Yes.

The Court: You are offering them, are you, for [69] what purpose?

Mr. Barnett: For the purpose of showing the frequent mentioning of the defendant Harvey

(Testimony of Charles H. Todd.)

Jackins in testimony running all through here and also the identification of numerous persons mentioned in the Committee hearings June 14th and throughout the Committee hearing investigation of Northwest communist activities and organizations also mentioned therein such as the Boeing and the Building Service Employees and numerous individuals.

The Court: Do you wish to offer objection?

Mr. Harris: Yes, your Honor, the objection previously mentioned. They are too far removed from the hearing and an additional objection, if this particular type of testimony or evidence is allowed to come in, I would believe then that if counsel desired he could get any testimony that the subversive activities control board listed the Northwest, hearings held in Washington, D. C., any other immigration or naturalization hearings where there happened to be some mention of the communist party or Boeing Aircraft Company or unions in this area. It would open up a field of testimony that possibly might have been elicited from Smith Act trials where this same thing was mentioned, and for that reason that additional objection is made as to these documents.

The Court: If the case were a jury trial I would [70] give much more thought to the objection than I do under these circumstances. I will overrule the objection and admit the document and you call my attention at a later time to portions that I should examine.

(Testimony of Charles H. Todd.)

Mr. Barnett: I will, your Honor.

(Defendant's Exhibit A-11 admitted in evidence.)

The Court: Do you have anything further? A-11 is admitted in evidence.

Mr. Barnett: Will you mark this for identification?

The Clerk: Defendant's Exhibit A-12 has been marked for identification.

(Defendant's Exhibit number A-12 marked for identification.)

Mr. Barnett: I am offering at this time, your Honor, Defendant's Exhibit A-12 which is a certified copy of the State of Washington, Secretary of State, of the Articles of Incorporation of Personal Counselors, Inc., showing the same, the organization that Mr. Jackins was working for at the time of the examination which concerned some of the examination of the Committee.

Mr. Harris: If your Honor please, I will object to this because as yet this record does not contain any testimony that the defendant was hired or employed by this particular corporation. Has the address, office place and where this [71] corporation has its particular place of business. These appear to be merely Articles of Incorporation or photostatic copies of the same that contain the name Personal Counselors, Inc., and showing apparently as one of the Board of the five directors named in

(Testimony of Charles H. Todd.)

Article 7 as being Harvey Jackins. I don't believe it is material.

The Court: It is not clear to me what the materiality of it is. However, I will make the same ruling here that I made before. You can call my attention at a later time to whatever force you think this Exhibit has and I will then more fully consider it. For now the exhibit is admitted in evidence over the government's objection.

Mr. Barnett: Thank you very much, your Honor. Will you mark this for identification?

The Clerk: Defendant's Exhibit A-13 has been marked for identification.

(Defendant's Exhibit number A-12 admitted in evidence, and A-13 marked for identification.)

Mr. Barnett: I am offering Defendant's Exhibit A-13, your Honor, which consists of a transcript of issued and certified by the University of Washington showing that it covers the period of time when Carl Harvey Jackins attended that institution. It is offered and will be related during argument, but I can say now that the years mentioned are [72] involved in the first count of the indictment, since 1935, together with other testimony taken in the hearings about Mr. Jackins being a leader at the University. I offer this in evidence.

Mr. Harris: The objection runs to this, if your Honor please, because as far as this particular case

(Testimony of Charles H. Todd.)
is concerned, I don't see the materiality of the document.

The Court: Same ruling as before the document is admitted in evidence. I will consider more fully what effect, if any, it has on the case in argument.

(Defendant's Exhibit number A-13 admitted in evidence.)

The Court: Anything further?

Mr. Barnett: I'd like to call Rev. Poor, your Honor.

The Court: Step forward. [73]

REV. GEORGE LESTER POOR

having duly affirmed, was called as a witness on behalf of the Defendant and testified as follows:

The Clerk: State your full name and spell your last name?

The Witness: George Lester Poor, P-o-o-r.

Direct Examination

By Mr. Barnett:

Q. What is your address, Mr. Poor?

A. 7044 Jones, N.W.

Q. Seattle? A. Seattle 7.

Q. And your occupation?

A. I am the minister in the Methodist Church in Ballard.

Q. What is the name?

(Testimony of Rev. George Lester Poor.)

A. Trinity Methodist Church.

Q. And do you know the defendant?

A. Yes, I have known the defendant ever since I have been the minister there because he has lived in my neighborhood and I have had to walk past his home as I would go from my house to the church.

Q. Is he a member of your church?

A. He is a member of our church now. His children, he has four children within our church school and he and his wife were approached by some of our people and they came to our [74] membership class and when the time of membership arrived I went to their home and they offered not to unite with the church if I thought it would be an embarrassment to the church. And I told them that the church was not concerned about being embarrassed by people, but that if the church had any fellowship, any redemptive qualities of life to offer any help, that that was what the church was for.

Q. Excuse me, Mr. Poor, are the children members of the church?

A. They are members of our church school, yes.

Q. How many years have they been members?

A. I don't know exactly. I have been Pastor there for eight years and I think the children have been coming for almost that length of time. It may be more.

Q. Do you know the reputation of the defendant and his general character in the community?

Mr. Harris: I will object to that. I don't see the materiality, if your Honor please.

(Testimony of Rev. George Lester Poor.)

The Court: Yes, the defendant has not taken the stand and accordingly his reputation for truth and veracity is not in issue at this time. Objection sustained.

Mr. Barnett: That is all I want to ask.

The Court: That is all, Rev. Poor. Do you have any cross? [75]

Mr. Harris: Yes.

Cross-Examination

By Mr. Harris:

Q. When was it that Mr. Jackins applied for membership in your church, sir?

A. About—well, I can't say exactly, about a year and a half.

Mr. Harris: No other questions.

The Court: That is all, Rev. Poor. You are excused and may leave at your pleasure. Call another.

(Witness excused.)

Mr. Barnett: I think your Honor, I want to offer the record now and if the Court will allow me a few minutes I will set it up.

The Court: Would you like me to take a recess for a few minutes while you "set the stage," as it were?

Mr. Barnett: All right, your Honor, I will appreciate that.

The Court: I will recess subject to call when you are ready.

(Whereupon, a recess was had at ten o'clock a.m. until ten-fifteen o'clock a.m., at which time defendant and respective counsel heretofore noted being present, the following proceedings were [76] had, to wit:)

Mr. Barnett: Your Honor, before playing this record I wish to state to the Court that I ran a literal transcript of the tape and it differs somewhat from Exhibit number 7 which did not purport to include all of the hearing, and it differs even a little bit from Pamphlet number 4 which does purport to give more of the hearing. In other words, there are certain changes, certain deletions or certain immaterial errors in addition, but I felt that to save the time of this Court in having the record played back again, that this should be a literal transcript and possibly it should be given now to the Court Reporter who could follow it and a copy to your Honor and a copy to Mr. Harris.

The Court: That is not uncommon of course. I have read a good many hundreds of transcripts of trials in my days as a lawyer and here on the bench and I have yet to find one that is not without some errors, some kind or other.

Mr. Barnett: Just a couple of them are material and it will be pointed out in argument. May I identify this then as defendant's exhibit?

The Court: Yes, you may.

The Clerk: Defendant's Exhibit A-14 has been marked for identification.

(Defendant's Exhibit number A-14 marked for identification.) [77]

The Court: A-14 is a transcript as I understand it, which you have carefully compared to this record or this tape recording and you say that it now is an absolute correct copy of the tape?

Mr. Barnett: As much as is humanly possible, your Honor, and I think probably even the government's secretaries in taking off the tape or in taking their own notes were in difficulty part of the time as appears, but it is the best we can do and the Court will notice on the top of this we have indicated certain indicia as indicating the capitalized words within parentheses, indicates words inserted in pamphlet which are not on the tape.

The Court: There isn't anything that you consider of any particular significance?

Mr. Barnett: Just two or three which I will point out in argument.

The Court: Allowing for human fallacy and error you think with that allowance this is correct?

Mr. Barnett: Yes, your Honor.

Mr. Harris: As I understand Mr. Barnett's offer, that he is offering Exhibit A-14 merely as closely as humanly possible he has taken the words off of the tape, and the tape ought to be marked so that we——

Mr. Barnett: I will offer the tape as part of the same exhibit number, your Honor. [78]

The Court: Very well.

Mr. Harris: I wouldn't want this to go in as being what actually transpired because it would be in conflict with what the official court reporter or reports of the Committee has verified as being the true recordation and so forth. It is not offered for

that purpose as I understand it.

The Court: The tape itself will be marked A-14. The transcript that Mr. Barnett has just referred to will be A-14-A, being the understanding that A-14-A is a transcript which Mr. Barnett says is a literal transcript of the tape recording. Whatever purpose it may have we will consider at a later time.

(Defendant's Exhibit number A-14-A marked for identification and admitted in evidence.)

DEFENDANT'S EXHIBIT No. A-14-A

TRANSCRIPT OF TAPE RECORDING OF TESTIMONY BY HARVEY JACKINS TO THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES JUNE 14, 1954. (This transcript has not been proofread.)

Differences, inserts and omissions from Pamphlet, Part 4, as prepared by the Government Printing Office (Defendant's Exhibit), are shown as:

Capitalized words within parenthesis indicate words inserted in Pamphlet, Part 4, and not appearing on the tape recording.

Capitalized words indicate variations, differences and omissions from Pamphlet, Part 4, and appearing on the tape recording.

In two instances, where a portion of the testimony on the tape has been omitted from Pamphlet, Part 4, special mention is made at the point and one parenthesis sign is used. In one instance, it is noted that the tape recording shows a difference between

Defendant's Exhibit No. A-14-A—(Continued) the Pamphlet, Part 4, and the Congressional Record citation (Plaintiff's Exhibit 7).

Mr. Tavenner. What is your name, please, sir?

Mr. Jackins. Harvey Jackins.

Mr. Tavenner. Will you spell your last name, please?

Mr. Jackins. Certainly. J-a-c-k-i-n-s.

Mr. Tavenner. When and where were you born, Mr. Jackins?

Mr. Jackins. I was born June 28, 1916, in northern Idaho.

Mr. Tavenner. Where do you now reside?

Mr. Jackins. In the city of Seattle, sir.

Mr. Tavenner. How long have you lived in the city of Seattle?

Mr. Jackins. A number of years, sir.

Mr. Tavenner: Approximately how long?

Mr. Jackins. Approximately twenty.

Mr. Tavenner. Will you tell the committee, please, what your educational training has been, that is, your formal educational training?

Mr. Jackins. I think so. I have been to grade school; I have been to high school; I have been to college.

Mr. Tavenner. How many years have you had in college?

Mr. Jackins. Somewhat less than four years.

Mr. Tavenner. At what institution?

Mr. Jackins. At the University of Washington.

Mr. Tavenner. When did you complete your training at the University of Washington? In what year? [1*]

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Jackins. I have not completed my training at the University of Washington.

Mr. Tavenner. WELL, AT THE TIME YOU STOPPED your work at the University of Washington?

Mr. Jackins. The last work that I took at the University of Washington, I believe would be around 1950.

Mr. Tavenner. How many years had you been in attendance at that university immediately prior to 1950? In other words, was there a gap in your attendance at the University of Washington?

Mr. Jackins. Yes.

Mr. Tavenner. Of a period of years?

Mr. Jackins. Yes, there was.

Mr. Tavenner. WELL, explain it briefly to us.

Mr. Jackins. Well, to the best of my recollection, I took no class work at the University of Washington between the years of 1937, or thereabouts, and around 1950.

Mr. Tavenner. Were you in the Armed Forces at any time between 1937 and 1950?

Mr. Jackins. I would like to confer with Counsel, sir.

Mr. Velde. Certainly.

Mr. Velde. Alright. Proceed. Answer the question, please.

Mr. Jackins. Will you repeat it, please?

Mr. Tavenner. Did you serve in the Armed

Defendant's Exhibit No. A-14-A—(Continued)
Forces of the United States at any time during the period 1937 to 1950?

Mr. Jackins. I did not.

Mr. Tavenner. Will you tell the committee, please, briefly, what your employment record has been since 1935? [2]

Mr. Jackins. Well, because of the character of this committee and the nature of these hearings, I must decline to answer that question, claiming my privilege under the fifth amendment to the Constitution not to bear witness in any attempt (ON THE PART OF THIS COMMITTEE) to involve me.

Mr. Clardy. Mr. Chairman.

Mr. Velde. Mr. Clardy.

Mr. Clardy. I ask that he be directed to answer. (THE QUESTION)

Mr. Velde. Certainly. That is a very simple question and the Chair sees no way in which that WOULD incriminate you (TO ANSWER IT) whatsoever, AND you are directed to answer the question, SIR.

Mr. Jackins. What the Chair sees and what might be the facts in the situation are not necessarily the same, Mr. Chairman. I have declined to answer, invoking my privilege under the fifth amendment not to bear witness against myself in any attempt on the part of this committee, considering THESE circumstances, to involve me.

Mr. Velde. And upon further consideration, you still invoke the fifth amendment, upon the Chair's

Defendant's Exhibit No. A-14-A—(Continued)
direction that you answer the question; is that correct?

Mr. Jackins. I have been informed by counsel that if I were to give testimony before this committee which would be at variance with witnesses who have appeared before this committee, seeking to curry the favor of the committee because of prison sentences hanging over their head, that regardless of the obvious lack of integrity of such witnesses I would still be subjected to possible charges of perjury.

Mr. Velde. Mr. Witness, the testimony of the previous witness has nothing to do with your testimony, WHATSOEVER.

Mr. Jackins. It has a great deal to do with the situation.

Mr. Velde. I AM ASKING YOU—I AM ASKING YOU WHETHER OR NOT YOU WILL ANSWER THE QUESTION OR WHETHER you refuse to answer IT UPON DIRECTION BY THE CHAIR? [3]

Mr. Jackins. I have answered very clearly THAT I DECLINE to answer that question under my privileges guaranteed BY the fifth amendment TO THE CONSTITUTION not to bear witness against myself in any attempt on the part of this committee IN THE SITUATION IN WHICH IT WORKS to involve me.

Mr. Velde. THEN upon direction by the Chair to answer THE question as to YOUR EMPLOYMENT—your previous employment—you still re-

Defendant's Exhibit No. A-14-A—(Continued)

fuse to answer upon the grounds of the fifth amendment. Is that correct?

Mr. Jackins. I have answered that very clearly, Mr. Chairman.

Mr. Velde. NOW, how do you mean that you HAVE answered very clearly? By refusing to answer? Can you tell me of one way in which your previous employment—I MEAN GIVING US THE BENEFIT OF YOUR PREVIOUS EMPLOYMENT—COULD incriminate you?

Mr. Jackins. Under other circumstances, Mr. Chairman, I would be very glad to discuss those questions, with you or with anyone else, but under the conditions of this hearing and the character of this committee, I must decline to answer that question as well, invoking my privilege under the fifth amendment TO NOT bear witness against myself.

Mr. Velde. ALRIGHT. Proceed, MR. COUNSEL.

Mr. Tavenner. How are you now employed, Mr. Jackins?

Mr. Jackins. I am employed as a personal counsellor.

Mr. Tavenner. In what type of business?

Mr. Jackins. In the field of professional personal counseling.

Mr. Tavenner. How long have you been so employed?

Mr. Jackins. Three and a half years, approximately.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Tavenner. That would take you back to 1950, to 1951, approximately, would it not?

Mr. Jackins. Approximately.

Mr. Tavenner. How were you employed in 1948? [4]

Mr. Jackins. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, claiming my privilege under the fifth amendment not to bear witness against myself in any attempt to involve me.

Mr. Tavenner. Did you hold an official position in 1948 or at any time prior thereto in Local 46 of the International Brotherhood of Electrical Workers?

Mr. Jackins. Under other circumstances, I would be glad to discuss that, but considering the nature of this committee and the character of these hearings I must decline to answer that question, claiming my privilege under the fifth amendment to the Constitution TO NOT bear witness against myself in any attempt to involve me.

Mr. Velde. May I ask the witness this? (QUESTION) Under what other circumstances would you be willing to answer that question?

Mr. Jackins. Under conditions otherwise than before this committee, Mr. Chairman. I would be glad to discuss the entire issue with you publicly.

Mr. Velde. To whom would you give an answer to that question other than THE members of this committee?

Mr. Jackins. Mr. Chairman, I would be glad to

Defendant's Exhibit No. A-14-A—(Continued)
discuss these issues with you say, in public debate, in a public discussion before a friendly—before an audience or before the general public. The actions of this committee in presenting testimony—

Mr. Scherer. Mr. Chairman.

Mr. Jackins. —from thoroughly discredited (PEOPLE) and people without integrity this morning has left me with no choice but to decline to answer that.

Mr. Clardy. Regular order, Mr. Chairman.

Mr. Velde. Regular order is ordered. Would you go under oath before me and discuss this question as to your employment OR matters involving your connection with the Communist Party? [5]

Mr. Doyle. I think, Mr. Chairman, he has volunteered—

Mr. Velde. Just a moment, Mr. Doyle. May I ask if he will answer this question FIRST?

Mr. Jackins. In your present capacity, Mr. Chairman?

Mr. Velde. Yes, in my present capacity naturally.

Mr. Jackins. My answer would be the same as I have made.

Mr. Clardy. NOW, MR. CHAIRMAN, may I suggest something?

Mr. Velde. The Chair recognizes the gentleman from Michigan.

Mr. Clardy. May I point out that since he has indicated a willingness to answer these questions before other people, he has waived any protection that

Defendant's Exhibit No. A-14-A—(Continued)
he might claim under the fifth amendment and I ask THEREFORE that he be directed to answer that last question,

Mr. Velde. Yes, I think the gentleman from Michigan is absolutely right. You are directed to answer the last question.

Mr. Clardy. Mr. Chairman.

Mr. Velde. Mr. Clardy.

The portion marked (does not appear in the Pamphlet Part 4 or in the Congressional Record.

Mr. Velde. (Will the reporter read that last (question over again?

Reporter. (May I ask if this is it? "Under what (other circumstances would you be willing to an-(swer this question?"

Mr. Velde. (No I'm afraid that isn't it.

Mr. Jackins. (Under circumstances not before (an accusatory body such as this.

Mr. Velde. (That isn't the question. She read the (wrong question. The last question concerning his (testimony under oath. [6]

Mr. Coughlan. (I think my client has the right (to ansyer that question, Mr. Chairman.

Mr. Jackins. (Your client's right to answer that (question will be observed as soon as the question is (located by the reporter. I think the direction to the (reporter was to locate the question.

Mr. Clardy. MR. CHAIRMAN, so that the record may be complete at this point I want to make

Defendant's Exhibit No. A-14-A—(Continued)
this observation, so that we will not overlook it. When he has stated that he is willing to answer that question under certain other circumstances or to other people, it is obvious that any claim that there is any protection afforded him by the fifth amendment is false because if he is willing to state it to others then there can be no possibility of it incriminating him AND I ASK THEREFORE THAT HE BE DIRECTED—

Mr. Velde. I am usually entirely in agreement with the gentleman from Michigan but (I BELIEVE THAT) he hasn't stated YET that he would answer the question (IF HE WERE) under oath AND HE IS UNDER OATH at the present time AND THERE MIGHT BE A DISTINCTION.

Mr. Clardy. I DON'T believe there is a distinction, Mr, Chairman, and ANY statement that he is willing to answer it indicates there can be no incrimination because if he gives testimony somewhere else, under oath or otherwise, he has at least touched upon the subject of which he is now apprehensive, if he has any such apprehension, and that obviously removes any possibility of claiming the fifth amendment in good faith and I am sure he is not claiming it in good faith but is attempting merely to filibuster and TO follow the usual communist party line and NOW I ASK THAT HE BE DIRECTED TO ANSWER.

Mr. Velde. HAS THE REPORTER FOUND THE QUESTION? NO, THAT ISN'T IT. THE SUBSTANCE OF MY QUESTION, MISS RE-

Defendant's Exhibit No. A-14-A—(Continued)
PORTER, YOU MAY NOT BOTHER ANY FURTHER ABOUT IT. THE SUBSTANCE OF MY QUESTION WAS SIMPLY THIS: (WITNESS) if we engaged in public debate or if we engaged in a private session where you came before me personally, would you answer the question that has been PROPOSED to you about your employment under oath? YOU HAVE BEEN DIRECTED TO ANSWER THAT QUESTION. [7]

Mr. Velde. Yes.

The portion marked (does not appear in the pamphlet Part 4 and the capitalized words within the marked portion do not appear in the Congressional Record.

Mr. Jackins. (The stenographer is in trouble. If (you will wait—

Mr. Clardy. (Witness, I think you can keep (your observations about the conduct of the pro-(ceedings to yourself. THE CHAIRMAN IS HAN-(DLING THIS. JUST ANSWER THE QUES-(TIONS AND YOU WILL GET ALONG A LOT (BETTER AND A LOT FASTER.

Mr. Jackins. (Thank you.

Mr. Clardy. (And we don't care for any thanks (or anything else from you.

Mr. Velde. That's right. And you have been directed to answer that question BY THE GENTLEMAN FROM MICHIGAN, MR. CLARDY. Do you understand, WITNESS, the question that has

Defendant's Exhibit No. A-14-A—(Continued)

been propounded and which you are under direction to answer?

Mr. Jackins. In the byplay here, I have lost track of where we are. If you would care to state the situation again I'LL BE—

Mr. Velde. You have been directed to answer the question as to whether or not in a session with me, in my capacity, whether it be public or private, you would answer the question as to your previous employment, under oath—the oath, of course, to be administered by me?

Mr. Jackins. Might I ask you a question? Is a hypothetical question such as that proper at this point?

Mr. Velde. If you will answer that question, instead of refusing to answer under the grounds of the fifth amendment, then perhaps we might consider the question FROM YOU.

Mr. Jackins. It seems to me to give you an answer to that, Mr. Chairman, would be only expressing an opinion. If it is your desire that I express an opinion about it, I will.

Mr. Jackson. Regular order, Mr. Chairman.

Mr. Velde. Regular order. [8]

Mr. Jackson. It is quite obvious that the witness has no intention of answering any questions which have to do with his alleged membership in the Communist Party; and I think it is SIMPLY a waste of time OF THE COMMITTEE AND OF THE AUDIENCE to pursue it any further. As far as I

Defendant's Exhibit No. A-14-A—(Continued)

am concerned, you can ask ask him the question now and excuse him from THE STAND.

Mr. Velde. WELL, ALRIGHT. The observation of the gentleman from California is very astue and wise. Are you a memeber of the Communist Party?

Mr. Jackins. Considering the character of this committee and the nature of these hearings, I decline to answer that question, claiming my privilege under the fifth amendment to the Constitution not to bear witness against myself in any attempt on the part of this committee to involve me.

Mr. Velde. Have you ever been a member of the Communist Party?

Mr. Jackins. Considering again the character of these hearings and the nature of this committee, I decline to anwer that question, claiming my privilege under the fifth amendment to the Constitution not to bear witness against myself in any attempt to involve me.

Mr. Velde. DO YOU HAVE FURTHER QUESTIONS, MR. COUNSEL?

Mr. Tavenner. Mr. Chairman, IT IS MY PURPOSE to inquire of this witness as to what knowledge he had regarding Communist Party activities in connection with CERTAIN unions of which he was a member or had official positions (WITH) but the witness has refused to answer that he was even a member of the first union that I mentioned. I think, however, that having asked that question, I should follow it up even if I do not pursue the others.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Velde. You may proceed.

Mr. Tavenner. Now were you expelled from local 46 of the International Brotherhood of Electrical Workers in 1948?

Mr. Jackins. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment. [9]

Mr. Tavenner. I suggest, Mr. Chairman, that he be directed to answer that question.

Mr. Velde. Certainly. You are directed to answer THE question. The Chair can see no reason why the anser to such a question should incriminate you in any way. You are directed to answer the question.

Mr. Jackins. What the Chair can see AND the actual situation need have no meeting ground at all, and again I repeat THAT considering the character of this committee and the nature of these hearings, I must decline to answer that question CALLING UPON my privileges under the fifth amendment not to bear witness against myself in any attempt on the part of this committee to involve me.

Mr. Tavenner. Were you also expelled as business agent of the Building Service Employees Union sometime prior to 1948?

Mr. Jackins. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment to the Constitution

Defendant's Exhibit No. A-14-A—(Continued)
not to bear witness against myself in any attempt on the part of this committee to involve me.

Mr. Tavenner. May I suggest that the witness be directed to answer that question?

Mr. Velde. Again, without objection, you are directed to answer that question.

Mr. Tavenner. Were you expelled from lodge 751—

Mr. Velde. Just a minute, MR. Counsel.

Mr. Tavenner. Excuse me, sir.

Mr. Jackins. Where are we now?

Mr. Velde. Again you are directed to answer the last question. Again the Chair and I AM SURE (THE MEMBERS OF) the committee sees no reason why you could possibly be incriminated by an answer to that question. You are directed to answer the last question.

Mr. Jackins. The same answer as I gave to the previous question for the reasons which I previously stated. [10]

Mr. Tavenner. Were you at any time expelled from lodge 751 of the Aero Mechanics' Union?

Mr. Jackins. The same answers which I gave to the previous questions and for the same reasons WHICH I stated.

Mr. Clardy. I ask that he be directed to answer.

Mr. Velde. Again you are directed to answer the question.

Mr. Jackins. Considering the character of this committee and the nature of these hearings, I decline to answer, invoking my privileges under the

Defendant's Exhibit No. A-14-A—(Continued)
fifth amendment to the Constitution not to bear witness against myself in any attempt on the part of this committee to involve me.

Mr. Scherer. Mr. Chairman.

Mr. Velde. Mr. Scherer.

Mr. Scherer. Witness, isn't it a fact that you were expelled from all three of these unions because of your Communist Party activities within the unions? Isn't that a fact?

Mr. Jackins. Considering the nature of this committee and the character of these hearings, I must decline to answer that question—

Mr. Scherer. Were you on the communist party payroll?

Mr. Jackins. —and for the same reasons.

Mr. Scherer. Were you on the communist party payroll?

Mr. Jackins. The same answer as to the previous question and for the same reasons.

Mr. Scherer. Isn't it a fact that you have refused to answer the question as to your previous employment because you were on the payroll of the Communist Party in this country during those years?

Mr. Jackins. The use of my privileges under the fifth amendment does not in any sense imply that any of your statements are fact. I am invoking my privileges and declining to answer that question under the fifth amendment in order not to bear witness against myself in any attempt on the part of this committee to involve me. [11]

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Scherer. ALRIGHT, Witness, tell me what part of the statements I have just made are false then?

Mr. Jackins. I decline to answer that question and for the same reasons.

Mr. Scherer. I thought you would.

Mr. Jackins. You were correct.

Mr. Clardy. May I ask a question, Mr. Chairman?

Mr. Velde. Mr. Clardy.

Mr. Clardy. Was there any reason, other than that cited by Mr. Scherer, for your expulsion from those three unions?

Mr. Jackins. Well, again I would like to draw your attention to the fact that the use of the fifth amendment and my privileges under the fifth amendment does not construe any guilt on my part or the accuracy of any of the statements made by the members of this committee. I decline to answer THAT QUESTION for the reasons previously stated.

Mr. Clardy. Did you ever engage in any espionage activities FOR THE COMMUNIST PARTY, WITNESS?

Mr. Jackins. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment.

Mr. Clardy. YOU MEAN you won't even answer THE QUESTION WHETHER OR not you have engaged in any espionage activities? (IS THAT CORRECT?)

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Jackins. Considering the nature of this committee and the character of these hearings, I must decline TO ANSWER, INVOKING MY PRIVILEGES UNDER THE FIFTH AMENDMENT.

Mr. Jackson. WOULD A TRUE ANSWER TO THAT QUESTION TEND TO INCRIMINATE YOU? Would a true answer to the question as to whether or not you have ever engaged in espionage (ACTIVITIES) tend to incriminate you?

Mr. Jackins. The use of the fifth amendment and my privileges under it does not in any way imply incrimination. [12]

Mr. Jackson. YES, we understand the provisions of the fifth amendment very well. WE LEARNED IT BEFORE YOU LEARNED YOUR LINES ON IT. The question is, "Would a truthful answer to the question whether or not you have ever committed espionage tend to incriminate you?"

Mr. Jackins. Because of the VERY nature of this committee and the character of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment TO THE CONSTITUTION not to bear witness (AGAINST MYSELF IN ANY ATTEMPT OF THE COMMITTEE TO INVOLVE ME).

Mr. Doyle. Mr. Chairman.

Mr. Velde. The Chair recognizes the gentleman from California, Mr. Doyle.

Mr. Doyle. My question does not involve the Communist Party. I noticed (THAT) you said that between 1937 and 1950 you did not render any

Defendant's Exhibit No. A-14-A—(Continued) military service to your own United States Government. Were you excused during those years for any reason from military service, or why didn't you serve? Would that incriminate you, too, if you told the truth in that regard?

Mr. Jackins. Mr. Congressman, I feel that you are trying to bait me on that, but I will try to answer it, if you wish.

Mr. Doyle. THAT'S WHY I ASKED YOU. I HOPED YOU WOULD ANSWER IT.

Mr. Jackins. The technical reasons involved in my being excused from military service, I assume you would have to refer to the draft boards to get down accurately. To the best of my knowledge, I was excused from military service during those years for three reasons, in series: the first a question of health —that my service was postponed for a year because of a physical examination which turned up certain health conditions of which I was not previously aware; that again my service in the Armed Forces was deferred because of a critical emergency involving the repair of fighting ships, where my skill was badly needed at the particular time; and, finally, I was deferred because I was regarded as too old at the expiration of that period. [13]

Mr. Doyle. What draft board excused you for each or any of those reasons? You have your draft card in your pocket, haven't you. MAY I ASK YOU TO IDENTIFY YOURSELF, PLEASE.

Mr. Jackins. I am unable to give you that information at this time.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Doyle. Do you have your draft card in your pocket? IF YOU DON'T, YOU OUGHT TO HAVE, I SUBMIT.

Mr. Jackins. I would have to search through my wallet, SIR, to see whether I have it with me or not. I have no notion.

Mr. Doyle. What was the number of your draft board and where (WAS IT)? YOU DON'T REMEMBER?

Mr. Jackins. Not at this time.

Mr. Doyle. What city was it in?

Mr. Jackins. It was in Seattle.

Mr. Doyle. Under what name did you register for military service?

Mr. Jackins. Under the name which I have given this committee.

Mr. Doyle. How old were you when you registered?

Mr. Jackins. If you can refresh my memory as to the date of the first draft registration, I can tell you.

Mr. Doyle. You don't remember?

Mr. Jackins. It would be not necessarily accurate.

Mr. Doyle. Approximately.

MR. JACKSON. I am told that the first draft registration was October of 1940.

Mr. Jackins. I would be at that time then approximately twenty-four years of age.

Mr. Doyle. May I ask one more question, Mr. Chairman?

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Velde. Mr. Doyle. [14]

Mr. Doyle. Every time you pleaded the fifth amendment, I noticed you said "because of the character of this committee". I don't know whether you have a speech ready to make or not—I presume you do—but this committee is ALL composed of Members of your United States Congress. Now do I understand that, because we are Members of the United States Congress and a committee of your Congress, there is something about the character of this committee that you have no respect for or trust in or confidence in? Is that your answer? I assume that that is the basis of your answer. You say "because of the character of this committee" and EVERY one of us is a member of your United States Congress. We're sort of cross-section of the United States Congress, so I assume when you use that language time after time that you are objecting to your United States Congress functioning as we have been authorized to function by the Congress.

Mr. Jackins. Mr. Congressman—

Mr. Doyle. Is that correct?

Mr. Jackins. I think there is a considerable difference between respect for an office and respect for the uses to which it is sometimes put.

Mr. Doyle. Of course the Congress, your Congress, created this committee.

Mr. Clardy. I think you ought to point out that the members were elected unanimously be the Congress to this committee.

Mr. Velde: Not only that but we should also

Defendant's Exhibit No. A-14-A—(Continued)
remind the witness that in this last session of Congress, when our appropriations came up before Congress, they were approved with only one dissenting vote. And so this is a representative body of the people of the United States, who elected the Congress.

Mr. Jackins. Which would not, in itself, establish the character of this committee nor the role which it plays.

Mr. Jackson. The character of this committee and the role which it plays had been LONG ESTABLISHED before the vote to which the Chairman refers. In other words, sir, 362 to 1 means that the people of the United States are speaking through their Congress, through this committee, [15] asking people like you to cooperate with the committee and give us the benefit, and GIVE Congress the benefit, and GIVING the American people the benefit of anything you may know about the Communist conspiracy. That you have failed to do completely and mere words about the character and the motives of this committee isn't going to change the fact that the American people ARE SPEAKING THROUGH THIS COMMITTEE TO YOU, SIR.

Mr. Jackins. Nor WILL IT NECESSARILY CHANGE the judgment of the people on the work of COMMITTEES SUCH AS THIS.

Mr. Jackson. The judgment of the people ON THE WORK OF THE COMMITTEE has already been passed in THE vote of their elected representatives, SIR.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Jackins. It will be passed again.

Mr. Jackson. WHICH JUDGMENT will be passed again comes the revolution. THAT WE ARE TRYING TO PREVENT.

Mr. Jackins. I believe that the judgment of the people on committees such as this is AT THE PRESENT TIME being passed, in a large measure, BY THE TELEVISION AUDIENCES WHICH OBSERVE THE WORKINGS OF PARALLEL COMMITTEES TO THIS.

Mr. Jackson. We are talking about this committee, sir, WE'RE NOT TALKING ABOUT any other committee, and the work of this committee will be reflected in the response and the reactions we receive from the people of Seattle and the Northwest area which, if it follows the course of other reactions, will be overwhelmingly favorable.

Mr. Jackins. If Mr. Doyle has an honest question THERE as to why I raised the question OF THE CHARACTER OF THIS COMMITTEE, I think I can EXPLAIN it to him.

Mr. Clardy. Mr. Chairman, I ASK that HE BE TOLD TO DESIST. HE has no business insulting Mr. Doyle or the Congress by using the language that he has and I ask that it be stricken.

Mr. Jackins. I meant no insult to Mr. Doyle at all.

Mr. Velde. I am sure that Mr. Doyle would not ask any dishonest question whatsoever. Do you want to repeat the question, Mr. Doyle; OR DO

Defendant's Exhibit No. A-14-A—(Continued)
YOU WANT TO GO ON TO MORE PRODUCTIVE— [16]

Mr. Doyle. I think the witness remembers my question VERY THOROUGHLY. I am sure he remembers it. I don't think, in view of your heavy load of witnesses, that I care to take more time.

Mr. Jackins. Mr. Doyle—

Mr. Doyle. May I say this to you, though, young man? I am very much disappointed in you that, as a young American THAT you take the position you do. You evidently have a leadership ability; you have evidently been a leader in labor; you HAVE evidently been blessed by your country, and I hope that you will reverse your opinion OF YOURSELF.

Mr. Jackins. You need not be disappointed in me, sir and I think—

MR. DOYLE. I AM.

Mr. Jackins. —I could easily explain to you why, but not under conditions such as this.

Mr. Jackson. Mr. Chairman.

MR. DOYLE. I WITHDRAW. I DON'T CARE FOR ANY MORE QUESTIONS.

Mr. Velde. Mr. Jackson.

Mr. Jackson. We have already taken up, I understand, forty minutes of time with witnesses, with many witnesses still to be heard. I would very respectfully suggest the regular order, in order that we may DISPOSE OF THIS WITNESS.

Mr. Velde. The Chair certainly concurs with the gentleman from California, Mr. Jackson. Mr. Coun-

Defendant's Exhibit No. A-14-A—(Continued)

sel, do you have any further questions to ask of this witness?

Mr. Tavenner. May I ask the witness one further question?

Mr. Velde. Proceed.

Mr. Tavenner. I think I should advise the witness that there has been heard in executive TESTIMONY before this committee the witness Elizabeth Boggs Cohen, C-O-H-E-N, and the witness Leonard Basil Wildman, both of whom were heard on May 28, 1954, and both of whom identified you as at one time an active member of the Communist Party, Mr. Wildman having identified you as the organizer of a branch of the Communist Party, while you were in attendance [17] at the University of Washington. This is your opportunity, if you desire to take advantage of it, of denying those statements, if there is anything about them which is untrue.

Mr. Jackins. Is that a question?

Mr. Tavenner. Yes. Do you desire to deny any part of that identification?

Mr. Jackins. Considering the character of this committee, and the nature of these hearings, I must decline to answer that question, calling upon my privileges under the fifth amendment to not bear witness against myself in any attempts of this committee to involve me.

Mr. Tavenner. Have you ever been a member of the Communist Party?

Mr. Jackins. The same answer as before for the same reasons.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Tavenner. I have no further questions, Mr. Chairman.

Mr. Velde. Mr. Jackson.

Mr. Jackson. No questions, MR. CHAIRMAN.

Mr. Clardy. Yah, a few. Witness, you told us that at THE present time you were engaged in an occupation that I didn't quite understand. What is it you are doing at the moment?

Mr. Jackins. I am engaged in the work of personal counseling.

Mr. Clardy. What do you mean by personal counseling? That is what I do not understand.

Mr. Jackins. I work with individuals to help them with their personal problems.

Mr. Clardy. What kind of personal problems?

Mr. Jackins. With their emotional difficulties, with the inhibitions which keep them from functioning well as individuals.

Mr. Clardy. Are you a medical expert OF SOME KIND or a psychatrist OR SOMETHING OF THAT SORT?

Mr. Jackins. Not at all. The approach is quite different FROM either of those fields. [18]

Mr. Clardy. Do you belong to some profession of some sort that is licensed by the State to engage in this SORT of activity, or is this something that you have invented yourself? I am serious about this. I want to know because I don't understand.

Mr. Jackins. May I have a little latitude in explaining it, sir?

Mr. Clardy. I haven't limited you.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Jackins. Fine, I am working with a very new approach to the problem of individual human beings. We have discovered, a group of us, that apparently anything wrong with an individual human, any limitation on his ability, his enjoyment of life, his ability to be intelligent in any situation is purely and solely the result of THE experiences of hurt THAT he has endured, including emotional distress WHICH IS quite as important as experiences of physical pain. That anything less than rational or able about an individual human being can be traced as a literal expression of experiences when he has been hurt, beginning very early and accumulating, and that it is possible, in a teamwork relationship, for one person's intelligence as a counselor to be linked with that of the person who is enduring the difficulty or the limitation or the emotional problem—to go back in memory in effect and by repetitively seeking out these experiences of hurt, discharging the stored up, painful emotion and assisting the person to think them over and over and over again, it is possible to free an individual from the inhibiting effect of the distresses which have stored up on him during his life. Now this is a very exciting field. The possibilities implicit in it—and we are pioneering—the group with which I work—are amazing.

Mr. Clardy. MAY I ASK YOU, WHO do you mean by "we"? Is this something originated by the Communist Party as part of its program?

Mr. Jackins. Considering the character of the

Defendant's Exhibit No. A-14-A—(Continued)
committee and the nature of these hearings, I must decline to answer that question, calling upon my privileges under the fifth amendment.

Mr. Clardy. Mr. Chairman, I ask that he be directed to answer. THERE CAN BE NO POSSIBLE INCRIMINATION THERE. [19]

Mr. Velde. Just a MINUTE, Mr. Clardy. May I again direct the audience, the physical audience, that are present here, that the committee cannot operate as it should under the duties it has with any disturbances of either (EXPRESSIONS OF) approval or disapproval. And the Chair and the committee would appreciate it if the physical audience present would not laugh or make any demonstrations whatsoever, either of disapproval or of approval.

Mr. Clardy. NOW WOULD YOU DIRECT HIM, MR. CHAIRMAN, to answer THAT last question?

Mr. Velde. (I AM SORRY I DIDN'T REMEMBER THE LAST QUESTION.) Would YOU read the LAST question, MISS REPORTER?

Reporter. Is THIS SOMETHING WHICH ORIGINATED BY THE COMMUNIST PARTY AS PART OF IT'S PROGRAM?

Mr. Clardy. I ask THAT he be directed to answer that (QUESTION).

Mr. Velde. Yes, the Chair directs you to answer that question. Is it a part of the Communist Party program?

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Jackins. I must decline to answer that question for the reasons previously stated.

Mr. Clardy. Who are the other people then when you use that word "THEY" that are associated with you in this movement?

Mr. Jackins. Under the conditions of this hearing and considering the nature of the committee I must decline to answer that question.

Mr. Clardy. I think I should caution you, Witness, (THAT) you do not have to decline to answer anything. I am assuming when you say you must that you mean you are. Am I correct?

Mr. Jackins. Certainly.

Mr. Clardy. You have been saying "I must decline". WELL THERE IS NO COMPULSION AT ALL.

Mr. Jackins. For the reasons stated.

Mr. Clardy. Very well. Are those that you associate with the persons that have been identified in this proceeding as members of the Communist [20] Party?

Mr. Jackins. I decline to answer the question for the reasons previously given.

Mr. Clardy. Have you ever been a member of any organization whose avowed purpose is the overthrow of this Government through the use of force and violence?

Mr. Jackins. Under the conditions of this hearing and considering the nature of the committee, I must decline to answer that question, invoking my

Defendant's Exhibit No. A-14-A—(Continued)

privileges under the fifth amendment not to bear witness against myself.

Mr. Clardy. Very well. One final question. Will you give us the names of the persons you are associated with in this activity THAT you have described?

Mr. Jackins. I must decline to answer for the reasons previously given.

Mr. Clardy. Mr. Chairman, I ask that he be directed, YOUR HONOR.

Mr. Velde. Yes, the Chair (MAN) directs you to answer that last question.

Mr. Jackins. I decline to answer the questions for the reasons previously given.

Mr. Clardy. That is all I have, MR. CHAIRMAN.

Mr. Velde. Mr. Scherer.

Mr. Scherer. No questions.

Mr. Doyle. I think I have two questions. You were the one that volunteered your present occupation IS working with a group, and FOR my book that is a waiver of your privilege under the fifth amendment. But what's the name of the group?

Mr. Jackins. Sir, I believe that the committee has sought to involve me in a trap on this question.

MR. DOYLE. THERE IS NO TRAP.

Mr. Jackins. Were I to decline to answer the question, certainly it is conceivable that I will be threatened with contempt charges. On the other hand, to answer it would lead to all sorts of other involvements as I have tried to explain previously.

Defendant's Exhibit No. A-14-A—(Continued)
So that in the circumstances I have no choice but to decline to answer the question, invoking my privileges under the fifth amendment to not bear witness against myself. [21]

Mr. Clardy. Mr. Doyle, I think you should ask the Chair to direct him to answer it, because I think THAT is clearly beyond the pale.

Mr. Doyle. I ask that the Chairman direct the witness to answer that question.

Mr. Velde. Certainly. There is no possible way that you can incriminate yourself by an answer to that question. You are directed to answer the question (MR. WITNESS).

Mr. Jackins. I decline to answer it for the reasons previously stated.

Mr. Doyle. NOW two more questions. Does THE office have an address here in Seattle? Do you work with a group with an office in some building? If so, where is that office?

Mr. Velde. WELL, may I suggest (MR. DOYLE) that you ask one question at a time. Would you ask (HIM) the (FIRST) question again?

Mr. Doyle. Yes. DOES THE GROUP YOU WORK WITH—YOU TESTIFIED, you volunteered that you were working with a group. Does that group have an office in Seattle?

Mr. Jackins. I work in an office in Seattle.

Mr. Doyle. Does the group that you referred to have an office with you in that same office you work in?

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Jackins. I decline to answer that question for the reasons previously stated.

Mr. Doyle. DO YOU HAVE A PROFESSIONAL CARD? Do you have a business card on you? A professional card that you use for identification of your work as professional advisor? If you have, will you please present me with one? Or present Counsel with one for identification?

Mr. Velde. I respectfully suggest that you ask whether or not he has such a card.

Mr. Doyle. WELL, I ASKED A COMPOUND QUESTION TO SAVE TIME.

Mr. Jackins. To my knowledge I have no card with me. [22]

Mr. Doyle. WELL, DO YOU HAVE ONE ON YOU? WILL YOU PLEASE GIVE IT TO COUNSEL? YOU CARRY A BUSINESS CARD, DON'T YOU? A PROFESSIONAL CARD? Why don't you answer honestly on that?

Mr. Jackins. I said I do not have one with me to my knowledge.

Mr. Doyle. Well, do you sell your services for a fee, a professional fee. Do you collect a fee for the professional advice you give?

Mr. Jackins. I decline to answer that question.

Mr. Doyle. IS THERE A MEMBERSHIP FEE TO THE GROUP—is there a membership fee paid to the group that you claim to be a member of?

Mr. Jackins. I decline to answer that question FOR THE REASONS PREVIOUSLY STATED.

Mr. Velde. Mr. Frazier.

Defendant's Exhibit No. A-14-A—(Continued)

Mr. Frazier. No questions.

Mr. Velde. Is there any reason why this witness should not be dismissed?

Mr. Tavenner. No sir.

Mr. Velde. If not, the witness is dismissed. Will you call your next witness, please?

Admitted in evidence March 15, 1955.

The Court: Very well.

Mr. Harris: Before playing the tape——

The Court: Those exhibits then will be admitted, A-14 and A-14-A. Both will be admitted with that understanding.

Mr. Harris: If Mr. Barnett might not now make the statement for the record as to the setting or the time and place in which the tape was made and the circumstances under which it was made, because certain sounds appear therein that I didn't want reflected as being made in the Committee Room.

Mr. Barnett: Counsel for the government has been [79] very kind and accommodating, your Honor. We couldn't locate any official tapes that were dubbed in by radio or otherwise. We didn't get it fast enough, but there were private parties who had taken tapes as it came over the air and the Court will hear announcers, radio announcers saying, making comments and in the particular home—and I honestly don't know which home it was in—there was a child and the baby wakes up a couple of times. Despite the background counsel——

The Court: Quite a scenario you worked out here.

Mr. Barnett: It is not the whole of the testimony, your Honor. I am sorry. I didn't intentionally work it out for that purpose.

The Court: I am sure you didn't. I was just trying to be pleasant about it.

Mr. Harris: Nor was the setting at the Committee hearing. That ought to be shown, too.

Mr. Barnett: That is right.

The Court: Well, you think that Mr. Barnett's statement is sufficient now to indicate that this tape was taken on a private machine in some private home from the radio broadcast of the proceedings?

Mr. Barnett: That is right.

The Court: It does contain some noises and sounds and speakers who were not actually at the hearing itself.

Mr. Barnett: That is right, your Honor. [80]

The Court: And you think that they will be sufficiently plain from hearing the record that I can tell which is which?

Mr. Barnett: Yes, your Honor.

The Court: All right.

Mr. Barnett: The only two that will stand out will be the baby——

The Court: I am sure I will recognize the baby.

Mr. Barnett: ——and the announcer.

The Court: Go ahead.

(Whereupon, the record referred to was played.)

The Court: Do you have any further evidence to submit?

Mr. Barnett: Excuse me a moment, your Honor.

(Whereupon, counsel conferred with defendant.)

Mr. Barnett: I think that is all.

The Court: Defendant rests?

Mr. Barnett: Yes, your Honor.

The Court: Government anything further?

Mr. Harris: No.

The Court: Both parties rested. About what length of time will you need to present the case to me in argument? The point I am getting at is this. We are going to reconvene the Starkovich case at one-thirty as you know. Counsel is [81] engaged in that case as well and I want to give some consideration to him if he needs it. If we can conclude this case by twelve noon or shortly following, we can do that now. On the other hand, if you think you'd like a little more time than that to present it to me, and I'd like some time to look over this material, maybe we had better continue this case over until the morning and take the argument on this in the morning and conclude in the morning.

Mr. Barnett: I'd appreciate that.

The Court: I will reread your brief. I have already read it once. If you have anything to submit in the way of a brief that you wish me to examine that is not already on file, give it to me and we will have a little more time to hear the case fully tomorrow morning. Is that agreeable to you?

Mr. Harris: All right with me.

Mr. Barnett: Very nice for me, your Honor.

The Court: Very well, I'd be able to give you a little more time in case you felt you need it once you get started. Sometimes you are inclined to estimate your time a little on the short side I know when you come to making your argument and you want more time than you thought. I think we will do that unless there be some convenience to you, either of you, that would be served by other arrangements.

Mr. Barnett: Distinct convenience to the defendant, your Honor. [82]

The Court: Very well. That will be the rule. We will continue this case until tomorrow morning at nine-thirty. Is nine-thirty agreeable to both of you?

Mr. Harris: Yes, your Honor.

The Court: Very well, and if the Starkovich case should go over then we will have to wait until it concludes. You will understand that and keep in touch with the situation.

The Court will recess now subject to call or in any event, to reconvene at one-thirty for the continued trial of the Starkovich case.

(Whereupon, further discussion re Starkovich case was had, and the following proceedings were had, to wit:)

The Court: We will recess this case until tomorrow morning at nine-thirty.

Mr. Barnett: With the consent of Mr. Harris I will rewind the record and then place it with the clerk.

The Court: Give it to the Clerk and the Clerk will put the appropriate tag on it and so on. You gentlemen may leave now if you wish and we will hear further.

(Whereupon, at eleven-twenty o'clock a.m. another matter was considered.) [83]

March 16, 1955

The Court: Are you ready to proceed then with United States vs. Jackins?

Mr. Barnett: May I address the Court?

The Court: Yes.

Mr. Barnett: There was one matter as a part of the defense which I hesitated to institute at the time, but I'd like to ask the Court to consider a motion by the defendant to allow this additional procedure.

I have noticed from reading of some of the cases that in some instances where counsel felt not free to reveal in open court the full extent of reasonable apprehension on the ground that to do so would be to waive the privilege, that some courts have allowed the defendant to go into chambers with the Court. I'd like to offer at this time, make an offer at this time, if the Court would entertain the motion, to allow the defendant to go into chambers with or without counsel, preferably without counsel with particular reference to two of the counts.

The Court: What counts?

Mr. Barnett: Two or three of the counts. Not all of the counts, your Honor. I figured it would be a matter of about five minutes.

The Court: What is your position with regard to that, Mr. Harris?

Mr. Harris: Well, I thought I had exhausted the [86] cases under this particular matter, if your Honor please, and I understand Mr. Barnett has cited some cases or referred to some cases. I would appreciate the citations because maybe there are some I have overlooked. I'd like to see the reasoning of the Court for allowing such a procedure.

The Court: I haven't run across those cases. Could you give me the citation?

Mr. Barnett: Well, your Honor, it would take me a few minutes to find them.

The Court: Before doing so extraordinary a thing as that—just because it is something I haven't heard of is no sign it can't be done because there are a lot of things I haven't heard of, but I want to be sure it is a proper thing for me to do. It strikes me as very unusual and I am not sure without a good deal of thought that I would want to set a precedent for hearing in a criminal case. Hearing in camera certain portions of the evidence strikes me as very unusual and even if the defendant requested, I question whether I should do it. However, if there is authority for it I will be glad to consider it. In other words, I am not one of those who will reject something simply because it is new and unheard of. If it is the proper thing and a good thing to do I will do it.

Mr. Barnett: There are even cases, your Honor, where private statements in writing by the defendant have been handed to the Court as part of the

evidence and I think one of [87] the first was in the Balman-Fagen case where additional evidence was given.

The Court: I will tell you what I will do. I think I will go ahead with the argument and in the meantime you can cite the cases that you say lay a precedent for that procedure and then I will consider it. Let's go ahead with the argument and consider it. It may turn out it isn't necessary, for all we know.

Mr. Barnett: If the Court please, in proceeding with the argument our motions were reserved. Now is it the wish of the Court that I speak to those first before the final summation?

The Court: I think it is just as well to present the whole issues all in a piece. In a non-jury trial I think we need not pay blind obedience to ancient forms. We can get at the whole business at one time.

Mr. Barnett: Thank you.

The Court: You may proceed, if you wish, Mr. Harris.

Mr. Harris: Yes, if your Honor please, I want to apologize first for not having a brief all together for presentation to the Court on this particular case, but I have made an attempt to refer to all the cases and for both cases that your Honor was to hear in this district.

Briefly, I would like to state that on the question of pertinency, that it is felt by the government that pertinency [88] has been established in this case and I think there is authority to the effect that on the question of pertinency the Court determines as

a question of law that can be determined either with receiving some evidence on the question or without receiving evidence on the question, and the cases holding that are the United States vs. Josephson case which I believe counsel is familiar with. It is found in 165 Fed. (2d), page 82. That was an Un-American Activities Committee hearing case in which the judgment of the District Court was affirmed by the Circuit Court. Likewise in the Marshall vs. United States and in United States vs. Cunningham, 176 Fed. (2d), 473 and the other found in 279 U. S. 597.

I merely say that, if your Honor please, that if there is any argument that the one particular question the purpose may not have been clearly shown by the testimony of Mr. Tavenner, I believe on the face of the question it is if it relates to some subject matter already gone into or some subject matter which is, obviously on its face would not link a person with a crime or a possible connection with the commission of a crime, that then your Honor can determine just by looking at the question it is, without hearing any evidence on it, whether that question was pertinent.

Now in reading 192—I am still referring to [89] pertinency—the language pertinent to the question under inquiry is not found in the first clause of 192. It is only found in the second clause of 192 but however it may seem, I think it is running less of a risk of asking and establishing the pertinency question, and for that reason it has been followed in other cases and I attempted to follow it in this par-

ticular case because it there refers to any matter, "any matter under inquiry" in the first section of it, so it would seem that they are eliminating the pertinency there and referring to pertinency in the second portion. As we have understood the 192 it is broken down into two different parts, failure to appear and then failure to testify or refusal to answer a question.

Now I point that out merely on the question of the decision on the matter of pertinency and as I said, I believe we have attempted to prove pertinency here in this particular case regardless of that fact.

The Court: Well generally I am of the impression that in considering pertinency we must take the very broadest view of the inquiry, the question on its face calls for information that under any conceivable theory might be pertinent. Not necessarily directly pertinent, but indirectly pertinent to the subject that Congress has the power to investigate. Then pertinency would be established on the face of it. On the other hand, if the question is [90] of such a character that the question itself does not indicate pertinency, then I would assume the government has the burden of showing by affirmative proof that the question was in fact pertinent.

Mr. Harris: Yes.

The Court: Now——

Mr. Harris: That is the only point I am trying to establish here.

The Court: That was my impression of the law

pertaining to this subject.

Mr. Harris: I think that is brought forward, if your Honor please, in a very recent case in 345 U. S. at page 41 in United States vs. Rummley. That was an Interstate Commerce Commission hearing where the witness was interrogated about returning income tax reports. They refused to answer that and the District Court did hold him in contempt on that matter, but then the Circuit Court reversed and the United States Supreme Court affirmed the Circuit Court because they said they were exceeding beyond the bounds of their power of inquiry.

The Court: And on the face of it the question obviously didn't pertain to the subject under inquiry, at least not on the face of it.

Mr. Harris: That is right.

The Court: Many times we know as lawyers that [91] questions may well be pertinent that don't appear so on the face of the question, but in such cases I would apprehend that the government must prove, offer proof that it was in fact pertinent.

Mr. Harris: That is my interpretation as well, if your Honor please. Now I believe that is as much as I wish to say affirmatively without referring to the brief of the defendant on the question of pertinency. I intend to do that in a moment.

The other matter is that there has been some discussion or some testimony concerning the motives and actions and utterances of members of the Committee. As I have viewed the law and attempted to run it down, that is immaterial and has no bearing

whatsoever on the defendant's refusal to answer, and I cite as authority for that Barsky vs. United States found in 167 Fed. (2d) at 241. It was an Un-American Activities Committee case and the case was affirmed by the Circuit Court. Likewise Gerhart Eisler vs. United States, the same ruling was held and that is found in 170 Fed. (2d) at page 273. Likewise it is an Un-American Activities Committee case and it was affirmed by the Circuit Court.

Further by way of answer to some of the arguments advanced by defendant, by the defendant during the presentation of their case, whether the Committee's practices or [92] procedures are desirable or not desirable, or whether the matter has got to the point where there was bickering between the Committee members and the witness, the Court has held the United States Supreme Court has held in United States vs. Fleischman at 339 U. S., 349 particularly at page 365, that the public's remedy is in Congress and not with the courts.

The Court: Political matter.

Mr. Harris: That is correct.

The Court: Not judiciary.

Mr. Harris: If I might then turn, if it please your Honor, to the trial brief advanced by the defendant here, and I have attempted to assist the Court in running down the cases as best I could, and on page 3 is listed the first case Bowers vs. the United States. That was a case, your Honor, not involving an Un-American Activities Committee, but a Senate Crime Investigating Committee popularly

known as the Kefauver Committee. That goes on the question of pertinency and the basic principle established by that case was the government must prove pertinency and it cannot be presumed unless on the face of the question it is obvious that it is pertinent.

The Court: Nothing in that case contrary to what——

Mr. Harris: ——What I have attempted to advance or what your Honor has stated from the bench. United States vs. [93] Orman cited on page 4, that again was a Senate Crime Investigating Committee. The conviction in that case was affirmed and in subsequence it went to the question of pertinency stating that pertinency, the question on pertinency even though not raised at the time of the Committee hearing, is not deemed waived and may be raised again later before the Court. And I think that is the situation we have here. There was no— it might be argued that it was waived at the Committee hearing, but the only point that this case stands for is that it again can be raised at the trial.

There was another interesting point, I think, found in that case and answers one of the arguments advanced here by the defendant in his brief. That is the pertinency of the question is the problem for the Court, not in sense of the answer, and the answer might be very, very innocent such as a disclosure as we might assume might be made by the defendant that the office place is located at 2611 Second Avenue. The fact that that might be a very innocent answer doesn't necessarily mean that therefore the question was not pertinent and——

The Court: The same thing would be true of where the witness might say, "I don't know." Still the fact that he knew nothing about it wouldn't bear on the question of whether the question was pertinent.

Mr. Harris: That is correct, the question [94] itself was pertinent.

Now the next case cited by the defendant in his brief is found on page 6. It is McGrain vs. Daugherty case. That again was a Senate Committee investigating elections and it merely in effect recites the principle that I think we are all agreed upon that the questions must be pertinent to the matter under inquiry. That case was reversed because the Court held that the question there was not pertinent to the matter under inquiry.

The following case cited on page 6 by the defendant was Sinclair vs. the United States. That again was a Senate Committee investigating elections 1929. The conviction of the lower court was affirmed and in some respects referred to the language in the McGrain case, but it held there that if the question is pertinent the witness must answer that question. However, it said the government must prove the pertinency and it is a question of law for the Court to decide whether or not the question is pertinent and comes within the function of the Committee. It held the lower court held it was and the Circuit Court affirmed.

One other interesting point advanced, I think, in the Sinclair case stating in effect that the good faith refusal of the witness was no defense so if

he refused, the fact of good faith in no way deterred from the refusal.

If your Honor please, the next case cited is [95] found on page 9, United States vs. Fitzpatrick. That case was reversed and the conviction in the lower court I say was reversed although the Federal Supplement citation that is found on page 9 where they affirm it—excuse me. I believe I have misspoken myself. The Fitzpatrick case originally was tried to the Court. The Court wrote an opinion and it is found in Federal Supplement and held that the witness avowedly claimed his right even though he didn't use the magic words, "I refuse to answer on grounds my answer would tend to incriminate me." The only words he used when asked the question was, "Fifth Amendment" and "Fifth Amendment," down the line, and the holding in that case was no particular words were necessary.

The Marcello case, the next case found on page 9, has to do with the Senate Crime Investigating Committee, the Kefauver Committee. The lower court's conviction was reversed because the case, the Court in this particular case held the witness was actually in a position of a defendant. He had been severely implicated by other testimony right into a situation where if he, I believe, even identified himself he might be putting the shoe on for incrimination. But that is not parallel to this particular case because there is no such linkage as might be found by the background that was existing in the Marcello case.

On page 11 is the next case that hasn't already

been [96] referred to by the defendant. He cites the Blau case, Blau vs. United States, found at 340 U. S., 159. There is another Blau case in 340, if your Honor please, and I think there is some comment needed for this reason. Patricia Blau is the one referred to here by counsel and——

The Court: Isn't she the one that was the secretary of the communist party in Colorado?

Mr. Harris: In Denver, and was called before the grand jury and asked to, the questions in that case were, "Were you a member of the communist party?" And she refused to answer those. They were pointedly incriminating in themselves and I think she avowedly refused to answer that question.

Now in the other Blau case, however, which is—her husband was also called before the same grand jury and his name is Irving Blau found in 332 of the same volume, 340. In that particular case the husband there was asked questions concerning his connection with the communist party, three or four of them, and he refused to answer. Then he was asked the question because his wife was then a fugitive, "Where is your wife?" And he refused to answer that both as to the Fifth Amendment and that it was a privilege communication, and the majority opinion in that case which was a seven, or four to three opinion with Judge Justice Clark not participating and one vacancy not yet being filled on [97] the Supreme Court held that the privilege, privilege communication between husband and wife was properly exerted and reversed the case on that point while the dissent, a three court dissent held

that the privilege was not properly exerted, which threw them immediately into whether or not the Fifth Amendment applied, and they threw that out, discarded that by saying the conviction should be affirmed. Justices—Justice Jackson and Justice Vinson were on the majority side.

If your Honor please, the Hoffman case is next referred to on page 12 of the defendant's brief, and in that particular case that was a matter before the grand jury and the language in that case I think is clear that there must be some reasonable apprehension. It just can't be confined to every and all questions asked, so that in the Hoffman case interrogation before a grand jury the questions there had to do with a special federal grand jury that was called in Philadelphia.

The impanelling District Court Judge advised that grand jury that they were going to inquire into various matters, frauds against the federal government, violations of customs laws, narcotics laws, liquor laws and so forth. And so Hoffman was called and he in effect was, could very well have been a co-conspirator or a subject in these various investigations before the federal grand jury, but even there [98] when the questions were asked the Court in substance states there must be some reasonable apprehension for the witness to claim the privilege.

The Court: A distinction that does not seem to be commented upon in any of these cases. What seems of some significance to me is that a number of these cases that have gone to considerable ex-

treme in sustaining the claim of privilege have been cases where the witness was under interrogation before a grand jury. Now of course the function of a grand jury is to consider whether or not the criminal charges should be laid. And I should think that where one is appearing before a grand jury the apprehension of criminal prosecution would be much greater than it would be before a Congressional Committee whose function, of course, is not to prosecute but to investigate for the purpose of legislation. However, I haven't seen any of the cases that comments on that distinction and maybe I am wrong about it, but it does seeem to me that it would certainly make an entirely different situation of it.

Mr. Harris: It would certainly go to the point of setting; some of the cases do refer——

The Court: As setting. In other words, a person called before a grand jury might be under a very considerable apprehension of the possibility of his being indicted and there be concerned about answering questions even more remote [99] than he would before a legislative committee, I would think.

If any effect is to be given to the setting in which the questions are asked at all——

Mr. Harris: That is one reason, if your Honor please, I tried to point out the outgrowth of each one of these cases by whether it was a Senate Crime Investigating Committee or crime investigating legislation or grand jury.

The next case is found on page 14 of the defendant's case, Rogers case. It is found in the same

volume as the two Blau cases referred to. And in the Rogers case that was a grand jury matter as well. Rogers in this case, I believe, was the custodian of some records of the communist party. She stated she was a, as I recall, a member of the communist party and that she was——

The Court: I think she was the secretary and had at one time had custody of its records or some such thing as that, and after going along a certain length of time she then decided she wouldn't tell where the records were or who had them, or something of that kind.

Mr. Harris: That is right. She said she had them at one time but didn't have them now so she was asked who she gave them to and refused to answer. The Court holds in effect she had opened the door to self-incriminating questions and on that particular line, that subject, and this was a question relating to that subject. Therefore, she couldn't then [100] stop at her own election and refuse to answer.

I think the government relies rather heavily on that particular case, if your Honor please, in this prosecution as to the last set of questions. I think they are the last four.

The Court: Last four?

Mr. Harris: Yes. The next case referred to by the defendant on the defendant's brief is found at page 17. And that is the Maffie case, a rather recent case decided in 1954. But there again that was a grand jury case investigating the Brinks robbery and Maffie was right in the middle as one of the

principal suspects and was called before the investigating committee and refused to answer. The Court, or the grand jury, excuse me, called before the grand jury and refused to answer. In that particular case he was in the position before that grand jury as a defendant in effect who the grand jury was seeking to get answers to questions, and a few other fellows who were also called and were held in contempt and then reversed finally by the Circuit Court because in effect they said these individuals were there as defendants before the grand jury investigating that Brinks robbery.

But one other point advanced by the Circuit Court of the First Circuit was a statement that the privilege against self-incrimination by these defendants could be [101] invoked except as to all but routine questions. I thought that was rather interesting for this reason, that routine questions I think very logically could be stated as person's name, address, occupation, family and then that is about it.

The Court: Those traditional things that you always start out with with almost every witness.

Mr. Harris: Yes.

The Court: Make you comfortable on the stand if you can.

Mr. Harris: Then the other case is found on page 19. It is United States vs. Kleinman. It is rather unique. It was decided in 1952 by a District Court judge and it was a hearing, outgrowth of a hearing before the Senate Crime Investigating Committee. In that particular case counsel who repre-

sented Kleinman was very astute to say the least. He advised his client before the Committee to refuse to answer because TV cameras were "being played on you." And the notoriety of it—so he took a gamble. There was no precedent for the Kleinman case either before or after for refusal to answer on that basis, but the District Court judge when he was cited for contempt went along with that. He refused to answer based on the fact that the TV cameras were focused on him. He said he wouldn't answer if they were and the cameras weren't turned off and he was asked the question again. That didn't happen, and the District [102] Court then held that he was privileged in that particular case to refuse to answer because of the setting and decorum.

The Court: More on the First Amendment than on the Fifth then?

Mr. Harris: That is right. The Quinn case cited on page 20 also was a case growing out of the Un-American Activities Committee hearing. It basically holds, I believe, that in that particular case the defendant Quinn adopted the language of an individual who appeared immediately before him, before the Committee and says, "I refuse to answer on the same basis as Fitzpatrick did." And the Court said that he had validly claimed the privilege there and need not use any particular language to invoke that privilege. Also the Court went on to say that the witness need not, however, be directed to answer a question. There is a little confusion on that point, but we don't have that in this case.

The Court: No, you mean there was some doubt before this case whether the Committee should not specifically direct the witness to answer the question, whether that rigmarole had to be done in order to lay a foundation for a prosecution?

Mr. Harris: Yes.

The Court: But this case laid that thought abreast——

Mr. Harris: Yes, your Honor. The last case I believe cited is still on page 20 and that is the Bart [103] vs. United States Un-American activities case. The conviction in the lower court was affirmed by the Circuit Court. However, the Bart case has been granted certiorari by the Supreme Court but as yet no opinion rendered. The Circuit Court conviction is still in effect and that case among other things advances this proposition that once the witness before the Committee has refused to answer, he has refused. He can't later come into court and cure that position by wishing to take the stand and answer now truthfully and fully. So I think that is the primary purpose of that particular case.

With that, if your Honor please——

The Court: We almost had that problem precipitated in the previous set of cases of this character. Never heard any more about it. At the opening of the trial the defendant came forward and offered to purge himself by answering, but we never heard any more of it. But that point is involved in that case, you say?

Mr. Harris: That point was involved in the

Bart case and the Circuit Court in the Bart case says once he has refused and——

The Court: Well, just be common sense that it wouldn't do any good to tell the Court about it. It was the Committee that wanted to know the answer.

Mr. Harris: I think that is the reasoning. [104]

The Court: I would think so.

Mr. Harris: If your Honor please, that concludes my argument and I believe that—the government seriously urges that all the questions here, all ten counts are proper both under the law and the facts in this case.

The Court: Well, just before you conclude, I don't have any question in my mind, or very little question about pertinency as to any of the questions. I think almost every one of the questions on its face and particularly when taken in context with the questions preceding and following indicate almost without any further proof their pertinency. But I do have grave concern about privilege, particularly with respect of counts 3, 4, 5 and 6. Those counts all deal with this, the questions to the effect, "Were you expelled——" from such and such a union. Now the evidence in the case indicates that at least there is a suggestion that those particular unions were concerned with communist infiltration during the period under inquiry. I think it does, doesn't it, the evidence indicates that?

Mr. Harris: Yes, if your Honor please, there is some testimony by Barbara Hartle I think, has been introduced in exhibits here stating that there had been infiltration into these unions, you might say,

or domination by communist party of these unions. Not so much the membership being fifty per cent communist or anything like that. There was [105] nothing like that, but the domination over these particular unions had been controlled by the communist party.

The Court: Well, yes, I understand that, but there is some testimony that somehow or other these particular unions were concerned with communism infiltration to one extent or another. Is that not right?

Mr. Harris: I think that is right, your Honor.

The Court: Now taking that circumstance in mind, keeping that circumstance in mind, is it not reasonably conceivable that these four questions in counts 3, 4, 5 and 6 would form a link or could form a link in self-incrimination?

Mr. Harris: Well, if we take count 3, "Did you hold an official position in 1948 or at any other time prior thereto in Local 46 of the International Brotherhood of Electrical Workers?" let's assume the answer was yes. I think that just, other than knowing what position he held was it business agent or secretary or just what was it, would be the only other possible linkage.

The Court: Well, on the face of it of course that much wouldn't do anything, that much, but if he answered that wouldn't he then be obliged to answer other things about his connection with that union?

Mr. Harris: Well——

The Court: Supposing he said yes I was the umqua [106] of that union at that time and then the

next question is, well, in your capacity as the umqua didn't you have this problem or that problem or the other problem and so forth, wouldn't he have waived any privilege he had?

Mr. Harris: I don't believe so.

The Court: Well, that is the question.

Mr. Harris: In other words, let's assume that is the position he held in the union, "Were you then concerned with the communist infiltration in the union?" I don't think that question immediately follows from his stating what position he held in the union. I think that is two different points. In other words, when he has identified his position in the union he has stopped that line or has gone about as far—unless he was asked, "Who are the other members of the Board," or whatever it might have been, to try to establish that he was telling the truth as to his position in the union.

The Court: Well all right. Let's say that then for Count 3. That would answer for Count 3, but it wouldn't answer for Count 4 because Count 4 is just the other side of it. "Weren't you expelled from the union" at such and such a time.

Mr. Harris: If he answered yes——

The Court: If he answered anything about that——

Mr. Harris: ——they could ask him why. [107]

The Court: ——answered anything about it, supposing he said no, then they could go ahead and say, well, isn't it a fact that you were expelled because you were a communist or words to that effect or whatever. Open the whole subject up. So the an-

swer that you give me on number 3 wouldn't fit for either 4, 5 or 6 because there the Committee switched the form of the question and I don't think that that answer—now what is your answer on 4, 5 and 6?

Mr. Harris: Well, it's been weakened considerably. (Laughter.) I will have to concede that if the answer were yes or no that might be very innocent in and of itself, but it might very well open the door and——

The Court: Sure, that is the point. He could stop and say yes or no and that would be the end of it. There would be nothing incriminating about it of course, at least there is no evidence here before me to indicate that membership in these unions is a crime in and of itself, or being an officer of these unions is a crime. So that if he could stop with the answer it would be a very simple problem for us, but the problem arises as to how much further they could go.

I am of the opinion at the present moment that 4, 5 and 6 considering the evidence we have here to the effect that there was a communist problem in these unions, that the question, "Weren't you expelled" in the certain capacity [108] from these unions at a given time, clearly on the face of it indicates a possibility of self-incrimination, and if the witness refuses to answer on that ground, I don't think the Court can inquire very much further about it but must give real effect to the claim of privilege under the amendment, and that is the obligation of all of us to do; the Court or anyone

else is bound to give effect to the constitution that Counts 4, 5 and 6 must go out. I don't think that—unless you want to suggest some——

Mr. Harris: No.

The Court: ——other escape from the dilemma we are in on that.

Mr. Harris: My only position is that the questions in themselves are innocent but they very well might open the doors as your Honor has indicated.

The Court: All right, that will cut down our problem to that extent. Counts 4, 5 and 6 are dismissed on the ground that valid claim of privilege under the Fifth Amendment against self-incrimination was made and that the questions in themselves in the light of the testimony in the case indicate that there was reasonable apprehension on the part of the witness that a truthful answer to those questions would incriminate him.

Now on the—before I make any ruling on 3 I will hear from Mr. Barnett and also fully from him. I didn't [109] mean to foreclose you. I just saved you a problem of worrying about 4, 5 and 6.

Mr. Barnett: Thank you, your Honor. I was wondering whether or not since we are on the subject of privilege I shouldn't continue discussing that?

The Court: You use your own feeling about it, Mr. Barnett; it is no matter to me. I have already indicated that in general I am pretty strongly of the impression that all the questions were pertinent and so you are going to have to show me where I am wrong about that and I am perfectly ready to be

shown incidentally, but if you prefer to go on with the privilege business first, that is all right, too, either way.

Mr. Barnett: I think on the matter of pertinency the thing which interests me, your Honor, is the dilemma that I find myself in because of the fact that count 7 is itself pertinent on its face and possibly——

The Court: Really what you are going to say, I think, and what I have in mind, is that it backs up to the question of whether the privilege was waived, doesn't it, last four questions it backs up to that really?

Mr. Barnett: Yes, your Honor.

The Court: Because it is clearly pertinent. This Committee certainly had the right to find—it was pertinent to the matter of Un-American activities to know whether here [110] was an outfit that was engaged in rendering a service as a part of the communist program. It would be foolish to argue that that wasn't pertinent.

Mr. Barnett: But on its face, your Honor, the question standing alone in the indictment does not show any relationship to any testimony, and the only thing I could figure out when I got the indictment was that the government was taking a position not only as to waiver with respect to the preceding discussion of employment which introduced the last four counts, but was also taking the position of waiver which allowed them to introduce the first six counts. So that a great part of my brief was devoted to the whole subject of waiver trying to

protect the right of the defendant to claim his privilege on all counts.

I was not narrowing it down to just the last four.

The Court: No, I understood that when I read your brief. You had that problem of putting it in in advance of trial and I understood that.

Mr. Barnett: In that sense, your Honor, and taking the question out of—just on its face and relating it to the answer it introduces the theories that I have tried to expound in the brief, namely can there be a waiver when an answer is innocent on its face. This long discussion of counseling service given fully frankly and honestly had nothing in it. [111]

The Court: A good deal of it volunteered.

Mr. Barnett: That is right.

The Court: Far beyond what the question called for so that the witness if he got himself in trouble did it on his own hook.

Mr. Barnett: May I suggest to the Court as to that Mr. Clardy indicated that he had put no latitude on the question and the witness indicated he would need a little extra latitude, but he still volunteered and I don't detract from that a bit, but there was nothing in that answer in any way suggesting anything incriminating, nothing that had a bearing on matters which one privileges and the first part of my brief dealing on the subject of waiver refers to a case which incidentally inferentially answers another question raised by the Court during Mr. Harris' discussion, namely the Arndstein case which was a bankruptcy matter in

which it was held privilege was not waived merely because it was a bankruptcy hearing involved, that there was no compulsion on the witness to give testimony which might be used against him.

I haven't fully developed the theory, I didn't think it was necessary. I can later on in argument show where the application of the privilege has been extended to Congressional Committees and it is not limited to grand jury functions. [112]

The Court: Oh, yes, I am well aware of that. I have no doubt of that. All I suggested was that it might well be a different situation confronting a witness appearing before a legislative committee and one appearing before a grand jury.

Mr. Barnett: Before both of them, your Honor, I think the witness might give testimony out of his mouth which would furnish evidence against himself under oath and that could be very well used against him, and there have been cases brought on perjury. We have the Hiss case which was testimony before a Congressional committee in which there was a conflict between himself and Mr. Chambers and the whole essence of whether one may expose himself to any type of crime at that time was not fully explored, but there was an early case of perjury and now I think our Supreme Court in the Blau case and in other cases has carefully pointed out that and identification or cross-identification with any activities or any connection with activities or unions or members or other members might expose the witness to prosecution for conspiracy under the Smith Act as well as the matter of perjury.

Now for that reason, your Honor, I think I want to go back. I worked myself into discussing privilege. I want to go back to pertinency and say that I don't think that the defendant by that answer discussed anything that in any way was incriminating. And therefore, could not [113] have waived as to incriminating matters.

The Court: Oh, I see, your thought is that in order to open the door the testimony volunteered or given by the witness in response to a question has got to be in itself incriminating.

Mr. Barnett: That is the law as I understand it.

The Court: Before the door is opened.

Mr. Barnett: That is the law as I understand it, your Honor. For example, take the Rogers case.

The Court: New slant on it that I haven't had in mind before.

Mr. Barnett: Take the Rogers case, your Honor. The Supreme Court said, and the Bart case, both of those persons had very fully discussed their own personal activities but when it came to a discussion of other persons they refused to answer and the Supreme Court said that by their full discussion they had already discussed matters incriminating to themselves and so that opened the door and they couldn't expose themselves to any greater further incrimination.

The Court: Well, that is true that was said in those cases, but I didn't understand the language of those opinions to be—that that language was appropriate in those particular cases all right, but I understood that the language used there laid down

the rule that the testimony given or answer given had to be in itself incriminating. My understanding has been, [114] and my study of these cases—and as you can understand, I have read them all a good many times now—although I don't pretend to remember the details of all of them, that the opening up business occurs when the subject is discussed.

Mr. Barnett: Well, suppose——

The Court: That if a witness answers a question or volunteers testimony concerning a subject, that then he cannot later, having once gotten his foot in the door, cannot then refuse to continue with it after having gone partially in. Am I wrong in that?

Mr. Barnett: I appreciate the Court's statement and would like to point out the dilemma which I referred to earlier, namely that a witness being asked a question that has to do with any subject justified by the desire of the Committee to broadly bring in identification, and here the Court will note on my cross-examination of Mr. Tavenner I reminded him that he had gotten all of his identification in but he said they wanted more identification. They went into a discussion of a subject which he answered—and incidentally he answered practically every question they asked that was not incriminating—but on this one he answered on a subject that really wasn't pertinent in the answer, your Honor, and here I come back to pertinency. There was nothing in there, nothing in that answer that gave Mr. Clardy the right to say, who are these and are they members of the communist party. [115]

And the witness, not knowing anything about waiver law, tightening up, here comes communism.

Now your Honor, that is a tough, tough situation. Deny it and will they produce somebody out of that "we" or "they" who might be—how is he to know? I don't think, your Honor, it was a waiver sufficient on a volunteered subject that allowed them then to open up the door to this sort of thing.

Now your Honor will also remember Mr. Clardy said he really didn't know what—I mean Mr. Tavenner—what Clardy had, except possibly every member of the Committee always has a purpose in mind always within the broad terms of the resolution. And somewhere in this picture I am asking this Court to consider that pertinency was not present in the answer in such a way as to be a waiver to allow a member of the Committee to introduce the inference as set forth in Count 7. Who are "they" and who are these "we" and "we communists" or something that belong to the communist conspiracy. On its face, your Honor, the question is pertinent because it deals with communism, but by the very words asked it also gives a basis for a witness to retire back, not from the subject of his answer, but from an incriminating fact that there was none in that answer. He had not waived as had Mrs. Rogers and as had Mr. Bart.

I respectfully suggest to the Court for that [116] reason——

The Court: Now just a minute. See if I understand you. The point you are making now is that because Mr. Clardy coupled with his inquiry, who

are these "we" people that you refer to, coupled that with the statement, is this a part of the communist program, or words to that effect, that that somehow or other made it objectionable but that if he had only just said who are these people "we" that you refer to, that would have been perfectly proper thing for him to have asked?

Mr. Barnett: I think so, your Honor, and I really think he would have gotten an answer because all the way through this witness' testimony he tried to do it.

Now I have another phase to my argument, your Honor.

The Court: All right. You agree, is that right? That's exactly what is charged in Count 8?

Mr. Barnett: Count 8.

The Court: And Count 9?

Mr. Barnett: But your Honor, these questions concerned in their context are all one. Seven and 8 are one. I called the attention of the—in cross-examination that the Committee had split one question even in its own exhibit 7. Seven and 8 are really the same question and 7, 8, 9 and 10 are all the same question. It looked like they were on a scent, they were in hot pursuit. [117]

The Court: There is no doubt about that, which they had a right to be of course.

Mr. Barnett: Yes.

The Court: That is what they came out here for.

Mr. Barnett: On that subject, your Honor, privilege came in but I would like also to point out at this time your Honor, because we are on the subject,

it is an offshoot of the subject we are discussing now. This witness was being examined, cross-examined by counsel, by all members of the Committee. He was at the end of a long arduous time on the stand and as the Court probably noticed from the hearing of the record, it had been a difficult proceeding. There had been efforts to ask him every kind of entrapment question and I intend to argue on the main argument and show the Court four or five times he had the claim of privilege to the same question and that I am prepared to show this Court other than that the Court has already recognized on the other count, why he could not answer.

Methods of this Court, as was said in Marcello case, could not emulate or allow anybody to emulate in this court. You wouldn't have allowed one question and perhaps on a repetition you would have stopped it.

The Court: I wouldn't have allowed for one moment the conduct that the witnesses were putting on for this Committee either, for one little [118] moment.

Mr. Barnett: I agree, your Honor, but here is one lay man before five powerful Congressmen and as we go through this transcript I think we can point out to your Honor that those exchanges came first from the Congressmen. Mr. Tavenner took very little part in this. Where he asked the questions and came in and took the answers and the privilege there were only one or two times where he asked the Chairman to direct the witness to answer. They didn't leave this job up to the lawyer.

Your Honor, there are four or five times they made the witness ask for his privilege. There is a runaway thing in this whole proceeding that makes a very unique case. In all the cases I have read this man was the first witness called after Barbara Hartle and somehow or other by the attitude of the Committee and the first answers he began to give there developed a very wrong feeling, and I regret some of the words used by the defendant, but as between the defendant and five Congressmen and sitting before a Committee like this, your Honor, I do not think, coming back to the last four questions, that there was the intent after this harassment, this entrapment, this badgering all the way through here, there was the intent not to answer. In fact, your Honor, the whole transcript shows, not exhibit 7 but the whole, the pamphlet 4, and the record shows many, many answers, 48, 58, something like that, out of 78, there were only 28 questions [119] he did not answer, and out of those 28, your Honor, I think there were probably some questions asked four times.

The Court: Well, the only extent to which I have any legitimate right to consider the matter is, you are now referring to as I see it, would be if by virtue of the manner of examination the witness somehow or other was confused or inveigled into avoiding improperly, inveigled into waiving or setting aside a privilege that he intended to claim. I think the Court could justly consider that, but other than that it is not my province to consider how Con-

gress is going to attend to its business, no matter how much I might disagree or you disagree.

Mr. Barnett: I appreciate that.

The Court: It would be no part of my province to be telling Congress how to attend to its business unless it attended to it in such a manner in a specific case before me that indicated they had mistreated a witness or led him into a situation where he was not given full recognition of his Constitutional rights, so I don't think if they had asked it a hundred times, unless I could say that the asking of it a hundred times so beat down the will of the witness that he then lost his will to resist and so on and so forth, which I am sure you wouldn't suggest occurred here.

Mr. Barnett: I am suggesting it, your Honor, and as I go through this transcript again, your Honor, pointing [120] out where this man was asked three, four and five times and directed three, four and five times, where even the Chairman lost track of the questions, where the reporter couldn't find it, where—it was really a rough going and the voices were loud and people were really given a rough time. And it is too difficult for a layman to stand up before a proceeding like that.

The Court: Well, Mr. Jackins wasn't without aid. He had Mr. Coughlan sitting there immediately at his elbow and the record shows that he frequently took advantage of the opportunity to confer with his counsel, so I don't think you can make too much of that point. The record that was played for me indicated that in my judgment that the Com-

mittee was courteous, was pleasant in every way until they were baited by continual refusal to answer. The record indicates that every time any witness, both in this case and the other cases, asked for the privilege of conferring with counsel it was readily granted in the most pleasant and courteous manner. So I don't think you can make too much of that point.

Mr. Barnett: I am not discussing that. I am discussing the fact, your Honor, that first Clardy and then Scherer, then Jackson and occasionally Mr. Velde would go after him on the same question and making him repeat, repeat three, repeat the privilege three and four times, and he unfortunately in one instance said, "Under other circumstances I would be [121] willing to answer that question. So they spent two and one-half pages of this record, maybe three pages, trying to determine under what other circumstances and coming back time and time again. It was a very unfortunate affair because what it did was anger the Congressmen and they suspected that even then there was another waiver.

The Court: Getting a little bit afield on the matter, I think. Perhaps I have discussed it more fully than I should. I want to make it plain as far as I am concerned my only concern here is that, was there a violation of Section 192 of Title 2 of the United States Code.

Mr. Barnett: Well, then, if the Court please, I will probably do what I should have done to begin with and that is relate the defendant's evidence as to count 1.

The Court: Maybe so. I think we should have a break, not for your benefit or mine, but for the staff here. We will take our recess at this time.

(Whereupon, at ten-thirty-five o'clock p.m., a recess was hand until ten-fifty o'clock p.m., at which time defendant, and respective counsel heretofore noted being present, the following proceedings were had, to wit:)

Mr. Barnett: I think the defendant would like to direct the Court's attention to Counts 1 and 2 and the Court wanted to hear from the defendant on 3. [122]

The Court: That is right, as to all phases, but I think the orderly way would be to consider pertinency and then privilege and then anything else you may want to speak about.

Mr. Barnett: So far as I am concerned on pertinency as to 1, 2 and 3, your Honor, I know that there would not be reasonable apprehension if there wasn't pertinency and so I will take the exhibits with the Court's permission and review them now on Count 1 which is, how was he employed since 1935.

The Court: Yes.

Mr. Barnett: First we'd like to object to the terminology since it includes every year after 1935 and just by its very inclusiveness and vagueness includes any of the years covered already by the Court on the rulings on Counts 4, 5 and 6. It is indefinite and if he answered in any one year he possibily could also have been deemed to waive his

right as to any years since. I don't know at what point he would have been held to stop. But that is the first objection, your Honor, and the second one is that in any event he can show reasonable apphension.

First the exhibits starting with testimony of Barbara Hartle.

The Court: Just generally summarize it, Mr. Barnett. I mean you don't need to find the chapter and verse. If you say it is in the record I will accept your word for it. [123]

Mr. Barnett: It is.

The Court: Go ahead.

Mr. Barnett: She identifies Harvey Jackins as a youth leader in the University of Washington and Mr. Wildman mentioned by Mr. Tavenner in one of his questions in Exhibit 7, I believe your Honor, and in pamphlet 4 put in by the defendant as an exhibit, it is also mentioned. He says, "You have been identified in Executive Session by both Elizabeth Boggs Cohen and Leonard Basil Wildman as a youth leader at the University. This is your opportunity—," or something to that effect, "—to deny it or to say something." That appears in the record in the transcript.

The Court: Youth leader in communist activities, you mean?

Mr. Barnett: Yes, youth leader in communist activities very definitely identified by both of them. Now to show the relationship of that testimony to the years the Court will remember I offered the Court Exhibit A-13 which I now pass to the Court

asking the Court to note the lower right-hand corner which specifically sets forth the years from 1935, 1936, I think 1937 and those two or three years since.

The Court: Yes, it shows he was in school 1935, 1936 and 1937 in spring quarter.

Mr. Barnett: Yes, your Honor, and therefore that identifies him as being a communist leader at the University [124] in charge of youth activities I think Mr. Wildman stated. At any rate that is in his testimony before the Committee. In addition, your Honor, it appears clear from Mr. Tavenner's introductory question to Mr. Jackins on the stand as to the identification that had been made of him and that did he wish to deny or amplify. Now I think that, your Honor, starts the period after 1935 in the event the Court is not going to rule as asked for by the defendant, or the terminology since, but if we go ahead and look at some of the other exhibits on different years since that time, we come across one count which in addition also refers to one article, Exhibit 8, also refers to counts 2 and 3 because the year 1948 is mentioned. This Exhibit 8 consists of photostat of a Post-Intelligencer article Friday, January 16, 1948, in which there is a column headed "Electricians Drop Man From Union." Mentions Harvey Jackins as being expelled from two local unions for communist leanings, turned out of Local 46 of the International Brotherhood of Electrical Workers, expelled by the Executive Board because it was proved beyond doubt that he is a communist. He is mentioned again as being ousted as business agent of the Building Service Employees' Union,

also covered in count 5 which the Court has already ruled upon. But the Court will notice the context of the exhibit as to all of these counts, not just one, but 1, 2, 3 and 5. [125]

I'd like to pass this to the Court to show the basis for some apprehension. Further on the same matter, your Honor, of reasonable apprehension, I have Exhibit A-9, Saturday, April 5, 1941, being a photostat of the Seattle Post-Intelligencer with a large left-hand lead column entitled "Brown Urges Union to Act on Red Issue." This, your Honor, is 1941 and covers part of the period since 1935. If he was asked to answer that question it would have meant every year and in that column, your Honor, there is a long article carried over to page 2 for further continuance and just roughly, without reading it, it charges the communists are challenging the laws and policies of the International Association of Machinists to cause strife in the Aeronautical Mechanics Union, Harvey W. Brown, International Brotherhood of Aeronautical Mechanics, yesterday urged all the thousands of Seattle members of the Aeronautical Mechanics to attend mass meeting tomorrow when reports on the trial board investigation of communist charges against various members will be heard.

They appealed to the membership which was contained in the following signed statement issued by Brown challenging, restating the challenge by the communists to the laws of the union that the Committee investigating the charges against certain members will report their findings. The trial board

already has recommended that Harvey Jackins, Aeronautical Mechanics member, be expelled from the union and fined. The [126] action was taken after the board investigated charges that Jackins was engaging in communist activities.

And the same column contains a reprint signed, of a pamphlet signed by Morris Rapport which was passed out to Boeing workers at plant number 1, asking all comrades of the Boeing union to use every means possible favorable to the communist party program to be at a meeting and so forth.

I'd like to pass that to the Court.

The Court: I have heard it. I have it in mind.

Mr. Barnett: Here, your Honor, is one also from the Post-Intelligencer, Exhibit A-7, dated October 25, 1947, and covered by the term since and referring to the Building Service Employees' Union which is also mentioned and in context is related to Count number 5 already dismissed by your Honor. It is entitled "Banned Union Agent as Red," an article by Fred Niendorff and mentions Harvey Jackins as business agent for Local 6, and it also mentions Jess Fletcher, your Honor, and this is an Auburn School Board action flatly declining to negotiate with Harvey Jackins, business agent, for Local 6 when they ascertained he had been active in communist party activities.

Now Exhibt A-10 was the photostat of the Times covering November 26, 1947, your Honor, and has a lead column "5 Ousted from Posts in Union," referring to Local number 6, Building Service Employees' Union, in which Arthur Hare, the [127]

recently appointed trustee, suspended Harvey Jackins for—not suspended from membership in the union, but removed from their jobs. Jackins was suspended 1941 from the Boeing Aeronautical Mechanics Union, independent, in a cleanup of officers and members accused of communist activities.

The Court: Now Mr. Barnett, your point on this, as I understand it, is that if he had answered what his employment was during these, during this period, that would have opened the door to interrogation as to how his employment was terminated and what his connection with the union was and all that, is that your point?

Mr. Barnett: And if your Honor please, the link of evidence——

The Court: Do you want to give us what your view is? Let Mr. Harris interpolate his view on that.

Mr. Harris: If your Honor please, I have now found the argument of Mr. Barnett riding two horses at the same time. First of all, he argues as to 7, 8, 9 and 10, that the answer has to incriminate so that you can—then you can close the door that even though you open the door it doesn't allow you to go in any further. Now he argues here if he told where he was employed that would have opened the door, so I find I can't very well answer his argument until I——

The Court: I am—the same thought has been going through my mind, but if you concede that the impression we had, [128] or I had, at least, and you seem to join in it from your line of argument, if you

once start, once start answering in a given subject in a given field, that then it is too late to claim the privilege after that time no matter where that may lead you. That is your position on it, isn't it?

Mr. Harris: Yes, I think it is, your Honor.

The Court: As long as you stayed germane to the subject you have talked about.

Mr. Harris: Yes.

The Court: That has been my impression of the law. Now if that, if that is right, if that position is correct, then I think I have got to dismiss counts 1, 2 and 3.

Mr. Harris: Well, if your Honor please, on that basis as to 1, "Will you you tell the Committee briefly what your employment record is?" Now, he might state that I have been—well, let's say I am an electrician, I have been an electrician, I have been a——

The Court: Yes.

Mr. Harris: ——a mechanic out at Boeings, I have done possibly certain other types of jobs during that period of time, that I don't think necessarily says then, well when you held these jobs were you a member of the union, which then they can go on and say, if I was a member of the union then I am going to have to say, well, were you ever expelled from that union. If you were expelled then what was the reason for that [129] expulsion. I think the primary purpose of the question contained in Count 1 is an identifying question merely asking generally, and it states, "Please just state briefly what your employment record has been since 1935." That then,

how that would in any way mean that the Committee had in mind of going into all these other phases of the case——

The Court: The point of your comment is that Mr. Jackins could have answered that in a way that would not have opened up the, up any field that might involve self-incrimination, that is the substance of the point you make, isn't it?

Mr. Harris: I believe that is the question. Then let's say for instance—I do have a problem yet of being able to rectify the position that Mr. Barnett has taken. I feel this way, that if your Honor then dismisses Counts 1, 2 and 3, and if this case is then reviewed on 7, 8, 9 and 10 by a Circuit Court and they hold that our interpretation which is trying to be advanced here from both barrels by Mr. Barnett is wrong, then 1, 2 and 3 should not have been dismissed and we are in sort of a quandary as to an argument.

The Court: Whereas, if we leave them both in we are bound to be wrong one time or another.

Mr. Harris: That is right. (Laughter.)

Mr. Barnett: May I suggest, will the Court hear from me that this is a double-horned dilemma? He has his two [130] horns, I have mine, and it works in reverse, and if he concedes as he is arguing on four that there has been a waiver, he must necessarily checkmate himself on the first four. He is using the argument the first——

The Court: I don't think it necessarily follows because this first, this question in the first counts is not in the same category as Count 2 which pin-

points to a particular year and there is evidence in the record that in that particular year the defendant was involved in some sort of activity that might well have been basis for self-incrimination, whereas the first question in all likelihood was one of those general questions that you ask of a witness almost as a routine thing to give some idea of what sort of an individual this witness is.

The question is, "Will you tell the Committee, please, briefly, what your employment record has been since 1935?" Something generally of what his activities are, what line of work he has followed and so on. I would think that is what that question means. However, on Counts 2 and 3 I think they must go along with 3, 4 and 5.

Mr. Barnett: May I just——

The Court: Or 4, 5 and 6, I should say.

Mr. Barnett: May I suggest to the Court that if an ordinary person was asked what has been your employment record since 1935, it is perfectly reasonable for such a person to assume they want them to start giving their record. If you have [131] an employment blank that says state your employment record since 1935, you don't say you are an electrician. You start putting doyn '35, '36. '37. How are we to put ourselves back and say he should have said he was an electrician or business agent or something? I think, your Honor, the first reaction you had when you thought 1, 2 and 3 should be dismissed was based on that understanding, and I respectfully suggest that trying to read an interpretation into employment record into the mind of a wit-

ness six, seven, eight months ago and say he should have told what he was, I think that is just a little bit rough. He had a reasonable thought and a reasonable apprehension.

The Court: It seems to go with an uneducated witness, it is conceivable that that is so, but of course the record affirmatively shows that we are dealing with a Phi Beta Kappa man of presumably extraordinary education and intelligence. And I don't think that what you have said just follows. You have affirmatively proven here that we are dealing with a man of extraordinary intelligence and learning, at least we generally presume, we who are not Phi Beta Kappas, usually presume that those who are have extraordinary intellectual attainments.

Mr. Barnett: I think that there is an essence of penalty in being a Phi Beta Kappa and I still believe when a man is a Phi Beta, or an ordinary person, when someone says, [132] "What is your employment of record since 1935," if he had said I was an electrician, shipyard worker and so forth, that is not what they were after. And can I point out to the Court——

The Court: Then if they came after him on something more and pinpointed it to the point where it was obviously incriminating, then he could have claimed his privilege. I don't think—I think that the question in Count 1 was pertinent and I do not think an answer to it was privileged, but I do think that Counts 2 and 3, while I have some doubt about them, must go the way of Counts 4, 5 and 6.

Mr. Barnett: Well then, if the Court please, that brings us, if we can leave number 1, for the moment, to be covered on the subject of wilfulness.

The Court: As far as I am concerned 1 is in. I have heard all—I can't devote the whole day to it.

Mr. Barnett: I understand, your Honor. Now on 7, 8, 9 and 10, we are back again for just a little while, if the Court please, to this matter of a question which on its face as is who are the "we" involved in this activity. I respectfully ask the Court to notice that Count 7, to look at Exhibit 7 offered by the prosecution on page 7.

The Court: Yes, I am looking at it. I have it marked.

Mr. Barnett: The lower left-hand corner it [133] says, what is supposed to be count 7, "Mr. Clardy: What do you mean by 'we'? Is this something originated by the communist party as part of its program?"

Now the Court will notice Count 7 states, "Is this something originated by the communist party as part of its program?" Now the Court will notice as I brought out on cross-examination that that count in that double question leaves out the phrase, "What do you mean by 'we'?"

Now if the Court will turn the page to page 8 at the top down about five or six lines to Mr. Clardy again who states, "Who are the other people?"

The Court: I am following it. I am reading it so you don't need to read it.

Mr. Barnett: I see. I just want to point out to the Court that in the record played to the Court

there is no "we." The word is "they" and I don't know that I want to belabor the issue, but in the actual record itself it is "they." I want to suggest to the Court, and if necessary make a motion that these are duplicatous, that they are one and the same, that in going over the transcript or the record, that they had, they have separated two questions aimed at the same thing instead of just one.

The Court: Well I think that reading the context of the questions in Count 7 and Count 8 together it is quite apparent that after having asked the question in the first [134] form including both sentences, namely, "What do you mean by 'we'?" and "Is this something originated by the communist party as part of its program?" then when Mr. Jackins declined that, then Mr. Clardy said, "Who are the other people then when you used the word 'we'?" In other words, it is obvious to me he was then deleting that portion of reference to the communist party and putting the question without that objectionable clause.

Mr. Barnett: But that of course is not the wording of the count.

The Court: What?

Mr. Barnett: ——the wording of the count.

The Court: It is the wording of the next count.

Mr. Barnett: That still leaves 7 as——

The Court: Oh, yes, it still leaves 7 in, but I am talking about the next count. The next count deletes that clause that you find objectionable.

Mr. Barnett: You mean number 8?

The Court: Yes.

Mr. Barnett: My point of objection, that is——

The Court: The final count on this, in this series, it deletes everything that conceivably could be objectionable by saying, "What is the name of the group?"

Mr. Barnett: Well now——

The Court: How are you going to develop [135] that?

Mr. Barnett: That is where we were a little while ago, your Honor, and I suggest to the Court that I wanted to use the tape of the transcript if the Court will follow me from page 19 on that. The Court will note the long answer by Mr. Jackins and then Mr. Clardy says, "I may ask you, who do you mean by 'we'? Is this something originated by the communist party as part of its program?" Then the privilege is claimed and then Mr. Clardy says, "There can be no possible incrimination here." And Mr. Velde interrupts Mr. Clardy and directs the audience not to make a demonstration. Then Mr. Clardy asked for a direction that Jackins answer. The reporter tries to find the question and finds it and reads it.

Now I want to go along here, your Honor. Mr. Clardy repeats the question again, same question, "Who are the other people then when you use the term, the word 'they'?" This time from the tape it's "they" instead of "we." And the privilege is claimed again on the same question, and then Mr. Clardy says, "Are those that you associate with the persons that have been identified in this proceeding as members of the communist party?" That is related to all these questions. They just picked out what they wanted and I am asking the Court to see

the connection towards possible waiver again. If he says no, how is he to know which of the people of the hundreds that might go for personal counseling or might be involved, might be associated, the definition of [136] the word "association." Who are the "we." It is exposing him then from an innocent description of the work into the sort of discussion which he was thinking he had to avoid on Count number 1, but let us go on, your Honor, because I want to go to the bottom of page 21 where——

The Court: Now just a minute. I want to call your attention, if you are going to take so hypercritical a view of it, you must note the fact that in the answer on page 20 Mr. Jackins didn't claim the amendment. The basis he claimed on there was considering the nature of the Committee which is no basis for a claim of privilege at all.

Mr. Barnett: I think, your Honor——

The Court: Now I wouldn't be inclined to take so critical a view of it but you are.

Mr. Barnett: Thank you. No, I am——

The Court: You are taking a very close and critical view of it and I want to call your attention to the claim of privilege at that point wasn't based on a basis that there is any privilege for it at all. You notice that on about ten, twelve lines up from the bottom of page 20 Mr. Jackins said, "Under the conditions of this hearing and considering the nature of the Committee I must decline to answer the question." Which wasn't the basis for a claim of privilege at all.

Mr. Barnett: Well, your Honor, in my own notes that is the same privilege asserted twice to the same question. He [137] asked that question twice.

The Court: It isn't stated, though, that that is the basis. He says he isn't going to answer because of the character of the Committee which isn't a basis for privilege at all, if I were going to take a hypercritical view of the language used, which I wouldn't do.

Mr. Barnett: Well, what I really want to do, your Honor, is get the Court over to the point of view that it was expressed by Mr. Doyle following this conversation in which Mr. Doyle on page 21 just a little bit below the halfway mark says that was a waiver of his privilege under the Fifth Amendment. Now your Honor, when a Committee member thinks you have waived it and you thought yourself you shouldn't answer it, I am not asking to be hypercritical, but when they tell you you haven't incriminated yourself and it is brought up three, four and five times, it is too hard on an ordinary mortal, whether he be a Phi Beta Kappa or not, after an hour of this type of five powerful Congressmen pounding at you, your Honor, and he gave up, he just gave up.

They brought in communism, who are the "we." Your Honor, it is too much, and I am asking the Court to look at it in terms of the Kleinman case at this particular point. There was no intention on his part not to answer a non-pertinent question, but the Committee itself by introducing in all the "we's" and you can't separate their innocence, they wanted

him to say [138] something about communism. They wanted him, your Honor, to waive his privilege and as far as Mr. Doyle was concerned, he gave a long statement, "You waived your privilege." Now he says, "What is the name of the group?" And that is the basis of number 9 count, Count number 9 follows in the same statement, "But what is the name of the group?" Now, your Honor, on its face it talks communism. Is a witness supposed to look behind, beyond reasonable apprehension? What is the basis for reasonable apprehension? It doesn't have to be reasonable. It has to be satisfactory to the Court, looked at in the context from all surrounding circumstances, and that is what this defendant is depending on this Court for, to look at all the surrounding circumstances, and if the Court looks at it that way, giving a free, frank, voluntary answer and says he asked for it, he volunteered it, then perhaps the Court will say, Well, he had a right then to get scared when they started thinking he had wavied it and the Congressmen said he had waived the Fifth Amendment. So was he so wrong for an ordinary layman? And Mr. Doyle from California is a lawyer.

The Court: Well, the witness had Mr. Caughlin there to advise him and frequently did take his advice about it. I dare say Mr. Caughlin took as extreme a view of it in the other direction as Mr. Doyle might have taken in that direction, don't you?

Mr. Barnett: The advice was to claim his privilege [139] and he claimed it because of the question getting into communism. As a matter of fact,

supposing, your Honor, he had said, they had said, what is your occupation, what is your work when Clardy said that and Clardy said to him, look how this all started, Clardy said, "You belong to some profession of some sort. I am serious about this. I want to know what is it you do. Is this something you invented yourself?" Jackins said, "May I have a little latitude in explaining it, sir?" And Clardy said, "I haven't limited you."

The Court: And then he goes along and gives a long dissertation about this with great enthusiasm and volunteers a great deal of description about it and then afterwards refuses even to give the name of the group.

Mr. Barnett: My point is, your Honor, supposing he had said, "I refuse to answer that." Now your Honor, if he had refused to answer it and said it might incriminate him because of the nature of the work, he would have been up on contempt of that, but after he answered——

The Court: He had already waived, you have forgotten the fact he already waived on that at the very beginning of the hearing. If you refer yourself back to pages 4 and 5 of your transcript, you will find that he already waived on that.

Mr. Barnett: On his present occupation for work. [140]

The Court: Go back to page 4. You will find, "How are you now employed, Mr. Jackins?" "I am employed as a personal counsellor." "In what type of business?" "In the field of professional personal counselling." "How long have you been so em-

ployed?" "Three and one-half years." And so on. So he had fully opened up the subject of what he currently was doing at that time when he came back to this last question. If the Committee was interested in it, and if it was pertinent, why it was a subject they had the full right to inquire about and he had waived any privilege on it.

Mr. Barnett: Your Honor, we are discussing waiver here, I think, in a double-edged way and my theory of the law is and I think there is ample law for it and it is in my brief, the witness can stop short at such time as incriminating factors come in.

Now the mere fact he waives talking about employment does not mean, as Mr. Doyle suggested, he waives everything. If his answers up to that point have not furnished incriminating evidence, if Mrs. Rogers had not freely discussed all her communist activities, if Bart hadn't told about all his employment to people they would not have been held to waive their privilege. Now he——

The Court: Is there anything in the record—let's turn to another phase of it just for a moment. Is there anything in the record to indicate that this group was [141] in fact a subversive group nor any way engaged in any criminal activity?

Mr. Barnett: No, there is not a thing.

The Court: Then how could it have been incriminating?

Mr. Barnett: Your Honor——

The Court: How could it have been incriminating if there is no evidence that this group was engaged in any illegal activity either communism or

otherwise, how could it have been incriminating? He could have said, yes, the name of the outfit is Dianetics or whatever the name of it was, and the people connected with it are a group of so and so. How could that have been incriminating then?

Mr. Barnett: I have two points on that, your Honor. The first is the one I opened up with in asking the Court to give the defendant five minutes in chambers and the Court said he might listen to authority if I produce it showing it has been done, and if the Court will allow me time I will produce a case in which it has been done. But the second thing is this, your Honor, this identification of "we" among a large group of people opens up the possibility of unlimited definitions, of identifications, I mean, and the numbers of people that may have been involved in this counselling work, and puts him in a position where he may be furnishing evidence that could be used against him in perjury by saying nobody in there is a communist, or all these people are not communists, [142] and someone comes in and identifies one of them as being that way and your Honor, I will say to this court it is not in the record that is the situation. This man as himself a witness before the Velde Committee has found himself in a moral spot where he has people whose lives, families are involved. He doesn't want to involve them. Now I don't think it should be necessary to produce that evidence quite to that extent, but when they said, who are these "we" and that flashed through his mind, your Honor, what is he supposed to say? Well, will they produce, will they

produce another Chambers, will they produce somebody else, am I mistaken in my identification. I might respectfully ask the Court—I know time is the element—not for the purpose of reopening this whole argument, because I will rest on my brief if the Court would allow me to get that authority at such time as the Court—I think I can get it shortly and allow the defendant his five minutes, and he will use the exhibits now before the Court to prove what I am talking about.

The Court: You must keep in mind that we have, as I see it, three general matters to consider here. First, we have the matter of determining the issue as a matter of law. Secondly, we have the matter of determining the issue as a matter of fact, and then finally, we have the matter of circumstances that might well be addressed to the Court in extenuation and to be considered when imposing sentence. You see [143] those are the three different phases of the case that I have got to keep in mind. Now I am—I am first trying to give attention to the matter of law and I have dismissed some counts because I believe that as a matter of law they should be dismissed. Secondly, I give the thought if there be any fact issues, and then finally, if there be a conviction I will give full weight to some of the things you have said in imposing sentence which I recognize have a lot of merit for that purpose. But I question whether they have any merit on the matter of whether or not there has been a violation. I am trying to keep my tri-capacity in mind here as I hear you. Perhaps I should have a different hat for each phase of it, but you recognize that I do have those

three phases of the matter to consider. After having fully considered the matter much more than just the time we have spent here this morning as I am sure you must understand from my familiarity with the authorities, the fact I have been through this subject very extensively before, I am inclined now to also dismiss Count 7 because it is a compound question, conceivably might be objectionable. I am in doubt about it, but in a case of this type I think all doubts should be resolved in favor of the defendant and I am in doubt about it. Accordingly I think as a matter of law I will dismiss Count 7, leaving now Count 1, Counts 8, 9 and 10 in the case and to be considered under the evidence and the rules applicable, namely, with due regard [144] to the presumption of innocence, the burden of proof beyond a reasonable doubt and all of the other factors that a trier of fact in a criminal case must keep in mind.

Do you wish to be heard any further?

Mr. Harris: Just because of Mr. Barnett's urgence of this particular case your Honor, I have brought the Rogers case down and I am going to not argue with your Honor's dismissal of 7, but in view of that I would ask that your Honor reconsider your position as to Count 2, and I am reading, just like to make one or two references to the Rogers case which is in 340 U.S. page 367, and I am going to read just briefly from 372.

"But petitioner's——"

that is Rogers',

> "——conviction stands on an entirely different footing——"

referring back to the Blau cases cited first in this opinion, in this volume,

> "——for she freely described her membership and activities and office in the party. Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here [145] would not further incriminate her."

"Would not further incriminate her." They say here she had already described her membership, activities and office in the party. "Disclosure of a fact waives the privilege as to details."

Now apparently that is what Mr. Doyle is saying and which I argued to your Honor before from that statement. Now counsel argues that because there was no incrimination by this long answer as to his group, therefore there was no waiver as to the other point, and he might be arguing right in reading some of this language. The Court says the following, states the rule.

> " 'Thus, if the witness himself elects to waive his privilege as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop but must go on and make a full disclosure.'

> "Following this rule Federal Courts have uniformly held that, where incriminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."

They cite authority for that. [146]

> " 'Where a witness then——' "

Down further they refer to a Michigan Court case were a witness has voluntarily answered as to materially incriminating facts and it is held with uniformity he cannot then stop short and refuse further to explain, but must disclose fully what he has attempted to relate.

Now the Court states here that:

> "As to each question to which a claim of privilege is directed, the Court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination."

And I emphasize the word "incrimination" there. And then they say:

> "After petitioner's admission that she held the office of Treasurer of the Communist Party of Denver, disclosure of acquaintances with her successor presents no more than a mere imaginary possibility of increasing the danger of prosecution."

I ask for that reason, your Honor has stricken and dismissed Count 7 because the answer to that question is it might incriminate him?

The Court: Yes, that is the theory on which I strike. [147]

Mr. Harris: Now, going back to Count 2, "How were you employed in 1948?" The answer to that question even considering all the documents in evidence could not possibly incriminate without going on to further questions and for that reason I think it would be much more advantageous to get a clarification on that point. In other words, does the mere answering of that question then, not incriminating in itself, open the door to other question which may be incriminating? I think you can read the Rogers case and say no, it doesn't.

The Court: Well, the reason that I included—now maybe I was in error in my understanding of the fact. The reason I included the striking or the dismissal of Count 2 was on the theory that somewhere in the evidence here there was some indication that the defendant in that year was employed by the communist party in some activity or other. Am I in error on that?

Mr. Harris: My recollection is not the same. If —Mr. Barnett what is your recollection on that as to——

Mr. Barnett: My recollection, your Honor, in all the testimony in Barbara Hartle's testimony and other testimony it so relates the defendant to activities particularly in 1948.

The Court: Activities is not enough. Activities is not enough in my judgment. In my judgment it means employment. [148] Now I don't think that everybody that is a communist is necessarily em-

ployed by the communist party and accordingly doesn't include employment. We have this same situation up in one of the Portland cases where the same identical situation arose, and there was some evidence that the defendant in that case during the year in question was employed. I mean was a secretary or a chairman of the finance committee or some other thing which I in that case held was within the term employment.

Now I was assuming from what you had said that somehow or other it appeared that Mr. Jackins was or was alleged to have been an employee of the party during that year. Now if that is not the case, then my action on Count 2 is mistaken and I will rescind it.

Mr. Barnett: Well, we have evidence, your Honor, of his employment. Here is 19—what year are you referring to?

Mr. Harris: Just 1948.

The Court: 1948.

Mr. Barnett: Here is Exhibit A-8, January 16, 1948, showing he was expelled by executive board from a job because of communist activity.

The Court: Because of communist leanings or activities or towards that effect, but nothing showing he was in fact an officer or official or an employee of the party [149] in that year.

Mr. Barnett: He was ousted as business agent of the local of the Building Service Employees' Union and——

The Court: For what though? Don't stop there. The rest of it is what we want to hear, for com-

munist leanings or communist activities, something of that kind. That is different than employment.

Mr. Barnett: When it says a man is expelled and then he—on his job for communist activities——

The Court: That doesn't necessarily mean he is employed by the communist party, does it?

Mr. Barnett: No, I mean it might be so far as he is concerned, your Honor. I think we are asking here now for a burden of proof beyond, way beyond what was ever intended to come out of a man's mouth to furnish a link or chain or a scent. Here your Honor is putting us on burden of proof to prove something here. Here is party membership. Here is the Smith Act. Here is yes or no on activities through that year and that Committee knew exactly what it was after. Mr. Tavenner said, "It had been my intention, Mr. Chairman, to ask this witness concerning his communist activities in different unions and he has refused to answer my question, even says it was the first one." That is in Mr. Tavenner's testimony.

The Court: That came after this question [150] though.

Mr. Barnett: I know, but it goes back to the very first question he asked, your Honor. I don't know what more is needed to put a witness on guard on these matters. This is too great a burden.

The Court: My action when I undertook to dismiss Count 2 previously I was under the impression that you had indicated that there was some evidence in the cause from which the inference could be drawn that the defendant was employed by the com-

munist party during that year and that was the reason that I acted as I did, but it now appears that I was mistaken that there isn't any evidence to that effect. Most of the evidence is that he had some, one could infer from the newspaper article, and incidentally, I am going a long ways to take my proof of facts from newspaper articles, but I want to again render, take every reasonable doubt in favor of the defendant and for that reason I am accepting these articles at full face value for this purpose. It doesn't appear to me now that Count 2 should be dismissed because there is nothing to indicate that answering what his employment was in that year would have shown him, led to employment by the communist party.

Gentlemen, is there anything further now?

Mr. Harris: No, your Honor. [151]

ORAL OPINION

The Court: The questions presented by this case are as grave and deep as any questions that our generation are faced with. In a certain sense, of course, every criminal case is an important case, no matter how trivial the charge may be because to the defendant it is important if not to anyone else, but as criminal cases go, this case is a minor one, only a misdemeanor is charged. The maximum penalty authorized by law is relatively small in this court at least where we are frequently dealing with cases involving maximum penalties ranging up into many years, even to life imprisonment and death sentence, so that relatively speaking, this is an unimportant

case in that sense, but the questions that it presents are extremely grave because it involves on the one hand the undoubted power and authority, in fact imperative duty of the Congress of the United States to explore the threat of the communist conspiracy and to take appropriate action to prevent that conspiracy from reaching its avowed objectives. Nothing can mean more to our age and time and the welfare of our country than that Congress do discharge that duty thoroughly and extensively and effectively so as to protect us from the threat of the communist conspiracy and all of the horrors and beastiality that goes with it.

On the other hand of equal importance is the [152] necessity of maintaining the full vigor of the rights, privileges and immunities granted to the individual citizen by the Constitution of the United States of America. It may well be that if we deny to our citizens those Constitutional privileges and rights the conspiracy to that extent will have succeeded in having destroyed a part at least of what we hold dear in our Constitution.

We have the problem here of balancing on the one hand the important considerations involved in the right and power of Congress to investigate, to inform itself on a matter of this importance so that it may take appropriate action for the protection and benefit of the people, and on the other hand, we have the necessity of safeguarding the rights, not of this individual defendant only as an individual, important as he is, but for the protection of all of our people, citizens or otherwise.

The questions presented in this specific case both

of law and of fact are very difficult of solution. Minds far better than those of the present speaker have been wrestling with these problems and they haven't come up with any ultimate final solution to them. All I can do, of course, in my humble way is to follow what the higher authority has said these laws mean, what the Constitution means, and where they haven't spoken on it, to use my best judgment of what they will ultimately say when they get [153] around to speak on it. And that is what I have got to do here.

I am mindful of the fact that in this case I have a double responsibility in the first place in deciding the issue of guilt or innocence in considering both the law and the facts of the case. I am satisfied now that all of the questions in the indictment were pertinent, or perhaps I should say the answers to the questions would have been pertinent to be literally and strictly correct. The answers to those questions well may have been pertinent to the matters under inquiry by this Congressional Committee, so I have no difficulty at all in finding pertinency as to all of the questions, all ten of the questions.

The problem arises when we must consider whether some of the questions involved matters as to which the defendant rightfully might claim the privilege against self-incrimination. Incidentally, it would appear that the only privilege claimed by Mr. Jackins was that of self-incrimination. In some of the other cases other witnesses have claimed privilege under the First Amendment and the Fourth Amendment and various other provisions of

the Constitution, but here Mr. Jackins has only claimed the single privilege against self-incrimination which is guaranteed by the Fifth Amendment to the Constitution.

I think under the evidence that has been submitted [154] here that the questions contained in Counts 3, 4, 5, 6 and 7 might reasonably have been considered by Mr. Jackins to have involved self-incrimination. While I have some doubt about it, I am resolving those doubts in his favor and as a matter of law I dismiss the counts that have just been referred to, namely, 3, 4, 5, 6 and 7. I hold that as to Counts 1, 2, 7, 8 and 9 they were——

Mr. Harris: Just a moment, your Honor.

The Court: Have I misspoke myself?

Mr. Barnett: You mentioned 7.

The Court: 8, 9 and 10, excuse me; 8, 9 and 10, that the claim of privilege was not properly invoked, that true answers to those questions did not reasonably involve any threat of self-incrimination, and that Mr. Jackins was required under existing law to have answered them.

So much for the law rulings. I am not clear in my own mind whether there is any other, any fact issue presented beyond that. It is perfectly plain from the transcript of the testimony which has been introduced, the testimony of Mr. Tavenner, that Mr. Jackins intentionally, deliberately and with specific intent not to answer, did refuse to answer those questions as I have interpreted the law and understand it to be in this instance. All that is required in order to constitute that particular element of the

offense is that the witness deliberately and intentionally [155] refused to answer as distinguished from failing to answer by reason of misunderstanding or inadvertence or mistake, or something of that kind. There is no room for any thought that Mr. Jackins didn't understand the question or that he misunderstood the fact that it was specifically directed to him.

The evidence shows that Mr. Jackins is a man of education and intelligence and I see no reason for supposing that he misunderstood. Accordingly that element of the case is clearly shown, namely the wilfulness of it in the sense of intentional and deliberate refusal to answer. It would seem to me that that is all that is required to constitute the offense. The law provides, Title 2, Section 192, provides specifically that any person properly summoned before a Congressional Committee who refuses to answer any question, and I underscore the word "any"—in other words, apparently that statute specifically makes it a criminal offense to refuse to answer any specific question in such a proceeding.

Here we have four such questions, the answer which was refused. On the last three questions, namely those in Counts 8, 9 and 10, if it could have been thought that there was anything privileged about those questions to begin with and counsel very frankly conceded that there was not, not in any of the evidence before me at least and that is what I have got to go on. I can't go on anything

other than what the evidence is. There is no indication at all that naming [156] this group or indicating in general who they were or whether they had an office with the defendant at the same place where his office was, that in any manner whatever answering that would have been incriminating in any case. But even supposing that it was incriminating, it is very clear in my mind that at the very beginning of the hearing, first few questions that were asked, Mr. Jackins did answer concerning his then occupation, and if there was any privilege about it, it was waived by his answer.

I am satisfied the law is that once a witness without objection and without claiming privilege enters into a discussion of a specific subject, that he may not thereafter claim privilege when he gets to the details of the matter. That is exactly what the situation presented here is.

Accordingly I find and hold that the defendant has been proven guilty beyond a reasonable doubt of the offenses stated in Counts 1, 2, 8, 9 and 10, and I find him guilty accordingly. Sentence will be imposed on Friday morning, March 25th. At that time findings, appropriate papers can be presented.

And I should say to you, Mr. Barnett, that what I have said here is not to be construed as meaning that I close my mind to a great deal of what you have said in the matter of imposing sentence. I think a great deal of weight should be given to the circumstances that you alluded to, but in [157] my honest judgment they do not afford a defense to the charge made, and accordingly when it comes to

the matter of imposition of sentence I will fully consider many of the circumstances that you suggested as a defense to the action. I think you have in mind what I mean.

Mr. Barnett: Yes, I have.

The Court: I think that unless the United States Attorney makes objection, that it would be appropriate that Mr. Jackins remain at liberty until sentence is imposed.

Mr. Harris: No objection.

The Court: No objection. Very well, Mr. Jackins I am sure you understand that you are obligated to be here when directed to be here for the imposition of sentence and available to the Court, do you not?

The Defendant: I do, your Honor.

The Court: And not to leave the jurisdiction and so on, so I will permit you to remain at liberty on your present bail, that bail that has previously been furnished and for that purpose.

The Defendant: Yes, your Honor.

The Court: Very well.

Mr. Barnett: Your Honor, in the beginning of the case I asked for special findings and——

The Court: Yes, I recall that you did and I would suppose that you may have the interval between now and the [158] time of imposition of sentence to prepare them, but if you choose to proceed otherwise I will be glad to consider them at an earlier time.

Mr. Harris: I asked Mr. Barnett now in view of the record as it now stands whether he still desired special findings rather than general findings and he

indicated he did, so in view of that I think probably I am going to prepare some and it may be that he wishes to prepare some likewise if he still makes request for special findings.

Mr. Barnett: Supposing, your Honor, I am allowed twenty-four hours to make a decision on that and I will communicate to Mr. Harris.

The Court: Yes, well very well. What we will do, we will continue the case, final disposition of the case for a further period of twenty-four hours. Let's do it that way. Let's continue the case for further consideration and keep it open until next Monday. In the meantime you can decide what you wish to do. If you wish to present your written specific findings, both of you on the morning of the 25th when I am back here for the imposition of sentence, I will be glad to consider it at that time. If you wish some decision about it sooner we will see what can be done about attending to it sooner.

Mr. Barnett: All right.

The Court: Is that satisfactory? [159]

Mr. Harris: Fine.

Mr. Barnett: Satisfactory.

The Court: I want to express my appreciation to counsel for the very fine manner in which the case was presented. It conforms to the highest traditions of our profession and I appreciate your kindness, the kindness and courtesy of both of you. The questions presented in this case are grave and serious questions and——

Mr. Barnett: I'd like to respond to that, your Honor, and state that for me and I am sure for the

defendant, we feel we have had a fair trial.

The Court: I tried to make it so.

Mr. Barnett: And counsel for the prosecution has been very accommodating.

The Court: Thank you, Mr. Barnett.

Mr. Harris: A bouquet to Mr. Barnett, too.

The Court: Recess now until one-thirty for the trial of the Gas Screw "Josey" case.

(Whereupon, Court was recessed at twelve o'clock noon.) [160]

March 25, 1955

The Court: The Court has been furnished with a pre-sentence report in this case, Mr. Barnett, and I have examined and have it fully in mind, and I am ready to proceed with the imposition of sentence.

Are you ready, and is Mr. Jackins ready?

Mr. Barnett: We are, and I might say to the Court there were filed motions for new trial, and the Court wanted to consider them at the same time.

The Court: Yes, I would.

I wouldn't want to consider it at any great length.

Mr. Barnett: I don't have that in mind.

The Court: Yes.

Mr. Barnett: It is based on the statutory grounds and pretty largely concerns the matter already known to the Court.

The Court: That we have covered pretty thoroughly before?

Mr. Barnett: Yes; and the only comments I have to make on it probably would be all similar to what I would make in connection with the statement re-

garding the sentence of the Court, so that I will cover them both at the same time.

The Court: Yes.

Mr. Barnett: First, I feel that the error in denying [2*] defendant's motion for acquittal, made at the conclusion of the evidence, was one both in law and in fact, and that ample ground was shown to sustain the privilege claimed as to all of the counts together, without saying as to the Counts VIII, IX and X.

It was, in effect, a denial of due process and fair trial because of the hearing before the Committee. It was, in all respects, really a trial. He was harassed and the Court is familiar with the evidence we put in the record. Grounds numbers two and three are to the same effect—judgment was contrary to the weight of the evidence—that the evidence was ample to show that there was sufficient danger to this witness before the Committee to justify his claim of privilege; and, further, that it was an error in law and in fact in holding that the last three counts were, in fact and in law—and the evidence disclosed by his evidence was that they were not—pertinent.

Now, passing from the argument on the motion, your Honor, to a statement in connection with the sentence:

I didn't state to the Court at the time, but I state now, that my own work is largely civil and I was asked to become interested in this case by an officer of the Bar Association.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

There had been difficulty in getting enough interest shown by members of the Bar, and the selectivity was limited and the [3] defendant before the Court went to the Bar and asked for references to attorneys who might take an interest in this case.

As I have gone through it, your Honor, I have noticed that it stands not really in crime, or in criminal law; it stands really on the political and Constitutional question.

The usual intent that one looks for in crime is not present in a situation like this.

The word "intent," as the Court referred to during the course of the hearing, is perhaps the wrong kind of a word to use; but, nevertheless, it is a criminal statute, and I realize the Court has to look at it that way, but I asked the Court to look behind the record to see the picture that faces a layman before five powerful Congressmen digging at him the way these men did, and I suggest to the Court in the course of 58 answers, there was ample evidence of willingness to cooperate up through the point where a witness, under the Constitution, has the right to invoke the protection on matters that he fears, and there is nothing un-American or unconstitutional about using the Constitution of the United States, and I think the Court made that clear in his own remarks at the conclusion of the case, and in that sense, your Honor, I think, keeping in mind the [4] absence of intent, that is usually needed in a case like this, and the great showing of cooperation up to a point, that it ought to have a bearing as the Court considers what to do about this

defendant; and, too, your Honor, I brought out during the evidence the fact that some aspects of at least the last three counts are all associated one with the other.

The address, and the name of the group, sort of insignificant matters, that Chief Judge Magruder, of the Second Circuit has referred to in a somewhat similar case as being——

The Court (Interposing): Excuse me.

(Whereupon, there was a brief pause.)

The Court: Excuse me, Mr. Barnett.

Mr. Barnett: These last three questions I was referring to, your Honor, about name and address and things like that, the idea that crime can be based on matters like that, where there have been 58 answers, looks terribly serious to me on a matter that stands on a political and Constitutional question. It is something like a phrase that Chief Judge Magruder used, like the tail wagging the dog. The seriousness of appearing before a Committee like this, legitimately after facts upon which to base legislation, is worrying the entire country now. Congress is trying to change its rules [5] and regulations, and, in that respect, and by way of conclusion, because I know the Court has in mind all the facts, it seems to me there is no place for the average citizen to go to restrain Congress except to go to the Constitutional restraints themselves, and, in this particular area, when Congress moves in, as it did, and as I stated in my brief, to subpoena six District Court Judges making decisions the way

they are making them, they are independent—can say they are independent of the Government.

When Mr. Truman is subpoenaed, he could say he was part of the executive branch and independent; and when Mr. Eisenhower was called in, Mr. Brownell wrote a classic opinion showing separation of Government. But, the average citizen has only the Constitutional provisions for restraint, and this is the last bulwark against running away tactics of a Congressional Committee and I am asking the Court to remember that a couple of times during the trial, the Court said, as a matter of law, and fact, you could not agree with me, but you would keep in mind extenuating circumstances at the time of sentence.

I think, your Honor, that is all I have to say.

The Court: The motion for new trial will be denied. I have fully given thought to the points raised by the [6] motion previously, and can only say of the situation what long ago was said, that the Court may be in error, but not in doubt.

I feel that under the existing state of the law, that there isn't any merit in the motion, and, accordingly, I have denied it.

I want to express to you, Mr. Barnett, my appreciation and respect for the thorough, vigorous, and yet courteous and dignified manner in which the defense has been presented here in a case in which tendencies are to do quite otherwise.

Your actions in the matter, in accepting the case and in defending it, are a tribute to you, and an

honor to the profession of which you are a member, and I compliment you on it.

In the matter of sentencing in this case, and in all of these several cases that I have now tried in this field, it has given me concern far beyond the intrinsic merits of the individual case.

The case is one for a relatively minor offense as criminal cases go, and, yet, the issues raised in it are grave and serious. Any thinking, conscientious citizen must realize that we are faced in this case, and in companion cases, with as difficult and troublesome questions as can be put to those charged with the conduct [7] of public affairs, and in the administration of justice.

An odd circumstance is that all through history sometimes seemingly inconsequential cases have presented some of the greatest and most important issues before the people of the time. It might well be that this kind of a case is another in that long line.

Imposition of criminal sentences is far and away the most difficult part of the Judge's duties, at least for this particular Judge. A Judge must constantly keep in mind that, as far as humanly possible, he cannot interpose his personal idiosyncracies and views, but must, as much as one can, apply the law with understanding, mercy, and yet firmness as one is obliged to do.

In considering the case, that point of view, I first come to the question of what is the offense involved. The offense involved under title II, Section 192, is the wilful refusal to answer questions. I have

found, and I think correctly so, that the defendant was guilty of that offense in several particulars. So, I have no doubt of his guilt under the law.

Then, in the matter of applying the appropriate sentence to that, it seems to me that I must consider how that came about, how did it come about that he wilfully refused to answer?

If it was because of his genuine concern for his [8] self-incrimination, if the witness appeared before the Committee and courteously, although vigorously, presented his claim of privilege, his views, and genuinely sought to afford as much information as he legitimately could, without incriminating himself, even though he was mistaken about it—namely, even though the advice of his counsel was incorrect, or his own judgment about it was incorrect—that is one kind of thing.

After thinking a great deal about it, I am fully convinced that that is the situation with Mr. Jackins, that he came before that committee, and thought of affording as much information and answering as many questions as he properly could without incriminating himself or putting himself in the position where he might be incriminating. I do not think that he came to the committee with a preconceived notion of contempt for it or contempt for the Government, or Congress.

Now, the reason I say that is that information given to me is that for at least the last five years Mr. Jackins has had no connection whatever with any subversive activity of any kind, he has led a law-abiding, worthwhile life in this community, and

there is not any evidence whatsoever that he has deviated from entirely [9] proper conduct in every way during that period of time.

Of course, I can't sentence here, on account of anybody's opinions, no matter how violently I might differ with them, but I think I have the right to consider these factors in determining what the degree of punishment, if any, should be.

I may be mistaken about it, but on the basis of the information I have, I think that Mr. Jackins came before the Committee, determined to answer as fully as he could without incriminating himself. That he had a right to do, under the Constitution. If the United States Constitution's guarantee against incrimination were applicable to only those who had no fear, it would be a hollow privilege, indeed. So, while I think Mr. Jackins was mistaken about it, and that he could have and should have answered those questions, I think he acted within his Constitutional right. I could easily get myself off here by pointing out how helpful it would be to the Government in a fight against the Communist Conspiracy if persons who knew much about it came forward. They will not find out much about the Communist Conspiracy from me, because I don't know about it, firsthand; but, those we have got to find out from, are those who have some connection with it. So that, I am not one of those who puts in [10] with castigating Committees of Congress for calling those before them. In my judgment, that is perfectly ridiculous. If you are going to call persons who don't know anything about it be-

fore the Committee, there is no point in having the hearing at all. You have got to call people who have some acquaintance with it, and, of course, if they have been members and active in the Conspiracy, they would make all the better witnesses, of course.

So, I personally do not go along with the criticism of the Congressional Committee in calling Communists and former Communists before the Committee to inquire what they should know about the Conspiracy. They should make the best witnesses. It is regrettable that under the circumstances, sometimes that involves incrimination and that prevents, sometimes, getting the information that would be very helpful, but that is the unfortunate thing, one of the very few unfortunate things about having a Constitution that guarantees us against self-incrimination.

Would you care to make any statement yourself, Mr. Jackins, now, before I impose sentence?

The Defendant: No, your Honor.

Mr. Harris: If your Honor please, just on a procedural matter.

The Court: Yes? [11]

Mr. Harris: I believe, at the conclusion of the trial, the case was continued because at that time Mr. Barnett requested special findings, and he was going to advise your Honor subsequently as to that matter.

I would like to have presented to the Court at this time, a general finding which we have all agreed to.

Mr. Barnett: That is right, your Honor.

Mr. Harris: And, as far as the record is concerned, may it be deemed to have been entered prior to the motion by Mr. Barnett for a new trial, and prior to your Honor's comments?

Mr. Barnett: That is so stipulated.

The Court: Very well; the findings have been signed and may be entered.

It is the judgment and sentence of the Court that the Defendant, Carl Harvey Jackins, upon his conviction thereof, is adjudged guilty of the offense stated in Counts I, II, VIII, IX and X, of the Indictment, and is convicted thereof, and, accordingly, committed to the custody of the Attorney General of the United States, or his duly authorized representative, for a period of six months, and fined in the sum of $250.00 on each count, the sentence to be concurrent, however, or, in [12] other words, only a total of those amounts, and the execution of the imprisonment portion of the sentence will be suspended on Mr. Jackins' being placed on probation according to the usual terms of probation for a period of two years.

The usual terms of probation, Mr. Jackins, are that you make reports in such manner as the Parole Officer will indicate to you, and that you will avoid any criminal activity, or activity subversive to the good interest of our Nation, and, in general, continue to live a good life that you have been living, apparently, during the recent years.

That will be the judgment of the Court, and the

fine may be paid in whatever reasonable time you wish for that purpose.

Would you like any special time, or not?

Mr. Barnett: Your Honor, I have notice of appeal ready, just as a formal matter, and would the Court care to set bond on that at this time?

Mr. Harris: I think probably the first question, Mr. Barnett, and then we can dispose of that, is: Is there any time requested for the payment of the fine?

The Court: Is any time requested for the payment of the fine?

Mr. Barnett: Well, it will be suspended, won't it, [13] at the time I file notice?

The Court: Yes, it will.

All right, then, I won't provide any special time. It will be the standard payment, then. I would have been glad to have given you some time on the payment of it if you wished it, but if you don't wish it, then I am not concerned with it.

Mr. Barnett: I think we are going to file notice of appeal, and that suspends it.

The Court: That does suspend it, yes.

I think the Bond on appeal can be continued in the same amount previously provided.

Mr. Barnett: All right.

Mr. Harris: There will have to be a new bond, however.

The Court: Oh, yes, of course.

Very well.

Mr. Barnett: I will file that in the next few minutes.

The Court: Very well.

The Defendant: Thank you, your Honor.

(Whereupon, hearing in the within-entitled and numbered cause was adjourned.) [14]

Reporter's Certificate

I, Earl V. Halvorsen, official court reporter for the United States District Court, Western District of Washington, Northern Division, hereby certify that the foregoing is a full, true and correct transcript of matters therein set forth; and I do further certify that the foregoing has been transcribed by me or under my direction.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed April 27, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) of the Federal Rules of

Criminal Procedure, and designation of counsel, I am transmitting the following original papers in the file dealing with the action, together with exhibits, as the record on appeal herein from the Judgment, Sentence and Order of Probation filed March 25, 1955, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Indictment, filed Sept. 15, 1954.

2. Appearance Bond, deft., $1,000.00, cash, filed 9-16-54.

3. Marshal's Return on Bench Warrant, filed Sept. 17, 1954.

3-A. Motion to Dismiss Indictment, filed Oct. 4, 1954.

3-B. Order Denying Motion to Dismiss Indictment, filed 10-4-54.

4. Waiver of Jury Trial by Defendant, filed 3-7-55.

8. Motion for New Trial, filed 3-25-55.

9. General Finding, filed 3-25-55, as to guilt of defendant on Counts I, II, VIII, IX and X of Indictment.

10. Judgment, Sentence and Order of Probation, filed 3-25-55.

11. Notice of Appeal, filed 3-25-55.

12. Bail Bond on Appeal ($1,000.00) (cash deposited under original appearance bond), filed 3-25-55.

13. Order Authorizing Transmittal of Exhibits, filed 4-22-55.

14. Designation of Record for Appeal, filed 4-27-55.

15. Court Reporter's Transcripts of proceedings, filed April 27, 1955 (in 2 volumes).

Plaintiff Exhibits Numbered 1 to 7, inclusive, and Defendant Exhibits numbered A-1 to A-14 and A-14-A, inclusive.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 27th day of April, 1955.

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14748. United States Court of Appeals for the Ninth Circuit. Carl Harvey Jackins, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed April 28, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14748

CARL HARVEY JACKINS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant was indicted in the District Court for the Western District of Washington, Northern Division, for refusal to answer ten questions propounded by the Un-American Activities Committee of the House of Representatives, each of which was made a special count in the indictment. After trial before the court and without a jury, counts III, IV, V, VI and VII were dismissed and the court entered judgment of conviction upon counts I, II, VIII, IX and X. With respect to the counts upon which judgment was entered, appellant submits the following statement of points on which he intends to rely on appeal:

1. The District Court erred in refusing to dismiss counts I, II, VIII, IX and X of the indictment.

2. The District Court erred in holding that appellant did not properly invoke his privilege against self-incrimination under the Fifth Amendment to

the Constitution of the United States in refusing to answer the questions on which counts I, II, VIII, IX and X are based.

3. The District Court erred in ruling that the appellant had violated 2 U.S.C. section 192 by wilfully refusing to answer the questions constituting the basis for counts VIII, IX and X of the indictment.

4. The District Court erred in ruling that appellant had waived his constitutional privilege against self-incrimination with respect to the questions on which counts VIII, IX and X of the indictment were based.

5. The District Court erred in holding that due process of law was afforded appellant in his appearance before the Congressional Committee.

6. The District Court erred in ruling that the appellant might have answered questions on which counts I, II, VIII, IX and X of the indictment were based without waiver of his constitutional privileges against self-incrimination.

7. The District Court erred, after dismissing count III, in ruling that counts I and II were not in context a part of the same question and in refusing likewise to dismiss counts I and II.

8. The District Court erred, after dismissing count VII, in ruling that the questions on which counts VIII, IX and X were based, were not a part of the context of questions on which count VII was based, and in refusing likewise to dismiss counts VIII, IX and X.

9. The District Court erred, with respect to

count I, in ruling that the question did not call for incriminating information which might form a "link in the chain of evidence."

Dated at Seattle, Washington, this 27th day of April, 1955.

/s/ ARTHUR G. BARNETT,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 27, 1955.

No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

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No. 14748

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INDEX

Page

JURISDICTIONAL STATEMENT 1

STATUTES:
Fifth Amendment 2
2 U.S.C. 192 2

STATEMENT OF THE CASE 3
Questions involved 6

SPECIFICATION OF ERRORS
I Contrary to the Fifth Amendment, appellant was deprived of a fair hearing, of liberty and property without due process and held to answer for capital or infamous crimes 9

II Circumstances of the hearing were such that plaintiff failed to prove beyond a reasonable doubt that appellant's refusal was the deliberate, intentional refusal constituting criminal intent under Title 2, Section 192 9

III The Committee failed to direct appellant to answer Counts 2 and 8 10

IV Appellant did not waive the privilege 10

V As to Counts 8, 9 and 10 the questions were not pertinent; the questions were not in good faith and were for harassment 10

VI Counts 1 and 2 were within the privilege against self-incrimination 11

VII Appellant was justified in feeling reasonable apprehension as to Counts 8, 9 and 10, and as to incriminating matters and as to committing waiver and becoming involved in perjury 11

VIII The privilege was properly invoked..... 11

IX Counts 1 and 2 should have been dismissed because they were in context to dismissed Counts 3, 4, 5 and 6..... 12

X Appellant had a right to "stop short" as to Counts 8, 9 and 10, and to be apprehensive because of the tactics of the Committee regarding waiver in which case rephrasing of the questions to delete reference to the Communist Party did not change the situation; especially so when the questions had no legislative purpose, were of minor value and the Committee already had the answers..... 12

XI As to Counts 1 and 2 the Court erred in substituting for reasonable apprehension a duty on appellant to know that the Committee only wanted general information..... 12

XII The Court erred in holding that the questions involved in Counts 8, 9 and 10 were pertinent..... 13

XIII As to the questions in Counts 8, 9 10, the Committee already had the answers in its records and files. These questions represented, in context with the question in Count 7, an effort to force the witness to waive his rights against self-incrimination. The questions were not pertinent to the inquiry... 13

SUMMARY OF ARGUMENT..... 13

ARGUMENT:

As to Specifications of Error Nos. 1 and 2..... 16

As to Specification of Error No. 3..... 39

As to Specification of Error No. 4 40
As to Specifications of Error Nos. 5, 6, 7, 8 and 9 43
As to Specification of Error No. 10 54
As to Specification of Error No. 11 58
As to Specifications of Error Nos. 12 and 13 61

CONCLUDING ARGUMENT 75

APPENDIX

Appendix "A" ..... a
Appendix "B" ..... b
Appendix "C" ..... g
Appendix "D" ..... k
Appendix "E" ..... n
Appendix "F" ..... o

TABLE OF CASES

Page

Alexander v. United States, 181 F 2d 480 52

Aiuppa v. United States (1952), 201 F 2d 287, 300. 30

Barsky v. United States, 167 F 2d 241, 246 56

Bart v. United States L. Ed. (Adv.) Supreme Court of the U.S., June 6, 1955 .....7, 28, 39

Blau, Patricia v. United States, 340 U.S. 159 ..51, 53

Bowers v. United States, 202 F 2d 447 (D.C. circ. 1953) 66, 67, 68

Burdeau v. McDowell, 256 U.S. 465, 477 (1921)... 34

Christoffel v. United States ,1949, 338 U.S. 84.... 68

Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) 53

Eisler v. United States, 338 U.S. 189, 196 (1949).. 79

Emspak v. United States, L. Ed. (Adv.) Supreme Court of the United States, June 6, 1955 .....7, 28, 36, 39, 54, 57

Estes v. Potter, 183 F 2d 865 52

Hoffman v. United States ,341 U.S. 479, 486 .....41, 48, 52, 53, 54

Journey v. MacCracken, 294 U.S. 125, 147-48, 150 (1935) 30

Kilbourn v. Thompson, 103 U.S. 168 64

Maffie v. Madison, (1954) 209 V 2d 225 42

Marbury v. Madison, 1 Cranch 137, at 163....72, 73

Marcello v. United States (1952), 196 F 2d 437... 48

McCarthy v. Arndstein, 262 U.S. 355 .....42, 56

McNabb v. United States, 318 U.S. 332, 347 (1943) 34

TABLE OF CASES (Continued)

Meyers v. United States, 272 U.S. 52 (1926)..... 73

Peters v. Hobby, October Term, June 6, 1955, Vol. 99, No. 14, Adv. Rep. Supreme Court Law. Ed., page 677.....36, 37

Quinn v. United States, L. Ed. (Adv.) Supreme Court of the United States, June 6, 1955.....7, 28, 29, 39, 78

Rodgers v. United States ,340 U.S. 367..... 57

Sinclair v. United States, 279 U.S. 263 (1929)..65, 70

Smith v. United States, 337 U.S. 137, 150.....56, 57

United States v. Bryan ,1950, 339 U.S. 323..... 68

United States v. Burr (CC Va. F. Cas. No. 14692E) 73

United States v. Fitzpatrick (1951), 96 F. Supp. 491, 494..... 50

United States v. Kleinman (1952), 107 F. Supp. 407.....29, 76

United States v. Charles Nelson, 208 F 2d 505, 512, 513..... 31

United States v. Ormon, 207 F 2d 148, 154..... 65

United States v. Rogers, 340 U.S. 367 (4 171-173).....42, 43

United States v. J. H. Rosenbaum, Criminal No. 1722-51 (D.D.C., Nov. 1953)..... 75

United States v. Rumely ,345 U.S. 41.....70, 77

STATUTES AND AUTHORITIES

Fifth Amendment to the Constitution of the U.S., The....2, 6, 9, 13, 16, 80

2 U.S.C. 192, R.S. 102....1, 2, 3, 7, 10, 14, 70

Title 18 U.S.C., Sec. 3231.... 2

28 U.S.C., Section 1291.... 2

Smith Act, The, Title 28, Sec. 2385....3, 17, 38

House Resolution No. 5, 83d Congress....15, 62

Public Law 601, R. 19....8, 15, 62, 63

VIII Wigmore on Evidence (3d Ed.) 291, Sec. 2250....27, 49, 77

Notre Dame Lawyer, The, (Vol. XXIX, No. 2 [Winter, 1954]) – "Judicial Protection Against Abusive Practices" by Telford Taylor....31, 52, 75

Tulane Law Review–"Congressional Investigations: Rights of Witnesses," Vol. 26, p. 381, at page 387.... 32

Gossett, William T.–"Are We Neglecting Constitutional Liberty?".... 32

Griswold, Erwin N.–"The Fifth Amendment Today" (Harvard University Press, 1955, Library of Congress, Cat. Card No. 55-6809)....33, 34, 35, 55

Coke, Second Institutes, 1656 (p. 48).... 34

Federalist, The–No. 78 by Alexander Hamilton... 73

Atlantic Monthly–Aug. 1953, "Outside the Law" by Abe Fortas.... 79

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction (R 9-12) on five Counts under a ten Count indictment (R 3-5 incl.) charging violation of 2 U. S. C., Section 192. The judgment was entered on the 25th day of

March, 1955 (R 9-12). Notice of appeal was filed March 25, 1955 (R 13). The District Court had jurisdiction under Title 18 U. S. C., Section 3231. Jurisdiction of this court is conferred by 28 U. S. C., Section 1291.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2 U. S. C. 192, R. S. 102, as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

STATEMENT OF THE CASE

Appellant was found guilty of contempt of Congress under 2 U. S. C., Section 192, for his failure to answer the questions represented by Counts 1, 2, 8, 9 and 10 (R 10). He was sentenced to six months imprisonment, suspended, and $250.00 fine. The Court dismissed Counts 3, 4, 5, 6 and 7 (R 180). All counts are set forth also in Argument, page 44-45 of this brief. The appellant was a witness before the House Un-American Activities Committee hearing held in Seattle, Washington, on the 14th day of June, 1954, Representative Harold H. Velde, Chairman.

The hearing in which the appellant and other witnesses testified was subsequently printed by the Committee and contained in a pamphlet entitled "Investigation of Communist Activities in the Pacific Area—Hearings Before the Committee on Un-American Activities, House of Representatives, 83d Congress, 2d Session, June 14th and 15th," and is Defendant's Exhibit No. A-4, pamphlet No. 4. Defendant's Exhibits A-1, A-2, A-3 and A-5 contain frequent references to appellant's alleged communist connections and activities and possible identification with communist leaders, some of whom are convicted Smith Act defendants, and consist of similar pamphlets published by the Committee and containing references to other testimony acquired by the Committee at other hearings

on Pacific Area communism, and excerpts concerning appellant have been condensed in Appendix "A". Appellant's Exhibit A-14-A is a transcript taken from a tape recording of the examination of appellant at the hearing and was furnished by appellant as a literal transcription of what actually happened, to show the atmosphere and setting which resulted in some confusion reflected by some material errors which appellant stated would be pointed out (R 81). Plaintiff's Exhibit No. 7 (R 28-29) is a printed pamphlet being House Report No. 2471 and is only an excerpt of the part of appellant's examination used as a basis for appellant's contempt citation. Plaintiff offered no exhibit containing the entire examination of appellant. Throughout this brief appellant will cite to pages of the record containing defendant's Exhibit A-14-A as being a more accurate and complete record of what took place, in addition to showing the atmosphere and setting. In addition appellant placed in evidence Defendant's Exhibit No. A-14 being a tape recording of the actual hearing.

Appellant had been mentioned in testimony before the Committee by Barbara Hartle, a convicted Smith Act defendant, as an active member of the Communist Party, being further identified with certain labor organizations allegedly dominated by communists. (Defendant's Exhibit A-2, pages 6067, 6094; Defendant's Exhibit A-3, page 6232; Appendix "A".) Likewise appellant was mentioned by other admitted former active

communists (Appendix "A"). Counsel for the Committee advised appellant that he had been identified as an active member of the Communist Party (R 106).

Out of approximately 67 questions, appellant answered all but 22, 10 of which were made the basis for the indictment. The trial court felt that appellant had gone before the Committee to afford as much information and answer as many questions as he properly could and that appellant did not come before the Committee with a preconceived notion of contempt for it or contempt for the Government, or Congress (R 191).

The case was tried before the court without a jury at the request of the defendant (R 7). Exhibit A-14, the tape recording, reflects what took place, the spirit of the Congressmen as well as of the witness. It is hoped that the appeal court will listen to this record. Appendix "B" consisting of excerpts from defendant's Exhibit A-4 and A-5, together with testimony (R 40) shows that the hearing was held in the presence of apparatus consisting of television cameras, microphones and constant "flash" photographers. Appendix "B" shows the constant harrassment of, and protests by, numerous witnesses and the reluctance of the Committee members to maintain a quiet and orderly hearing.

The basis for appellant's reasonable apprehension is shown, not only by some of the Committee questions,

but also by newspaper articles represented by defendant's Exhibits A-6 to A-10, inclusive, starting in the year 1941. Except for a photograph of appellant in one of these articles all are reproduced for convenience in Appendix "C." The State of Washington, 1947 Legislature, authorized a legislative investigation into un-American activities, commonly known as the Canwell Committee; the appellant was constantly mentioned throughout the hearings of this Canwell Committee by many witnesses and ex-communists (Defendant's Exhibit A-11 appearing in Appendix "D"). Defendant's Exhibit A-13 consists of a certified transcript of appellant's University of Washington record and was put in evidence because counsel for the Committee advised appellant that witnesses before the Committee had identified appellant as an organizer for the Communist Party at the University of Washington. The transcript shows attendance at the University of Washington and covers years "since 1935."

The questions involved and set forth substantially in the Specification of Errors and Arguments, are:

1. Whether under the Fifth Amendment the appellant:

   (a) Was denied due process in that he did not have a fair hearing,

   (b) Was denied due process in being deprived of liberty, or property, without due process,

(c) Was held to answer in a public hearing for a capital, or otherwise infamous crime.

2. Whether or not under *2 U. S. C., Section 192,* plaintiff has proved beyond a reasonable doubt the appellant's criminal intent in that appellant deliberately and intentionally refused to answer the questions covered by Counts 8, 9 and 10 under the conditions of the hearing.

3. Whether as to Counts 2 and 8, as a matter of law, and in view of the recent decisions of the Supreme Court in *Quinn v. U. S., Bart v. U. S., Emspak v. U.S.,* 99, L. Ed., (Adv.) June 6, 1955, the appellant should be acquitted for failure of the Committee to direct appellant to answer the question.

4. Whether the questions represented by Counts 1 and 2, respectively, to-wit: "Will you tell the Committee please, briefly, what your employment record has been since 1935?" and "How were you employed in 1948?," gave the appellant basis for feeling reasonably apprehensive that the answers to said questions would:

(A) Tend to incriminate him or furnish a link in a chain of evidence to incriminate him;

(B) Constitute a waiver of his privilege under the Fifth Amendment to the Constitution of the United States.

5. Whether or not Counts 1 and 2 should have been

dismissed because in context and time they are related to dismissed Count 3; Count 1 also being related in context and time to dismissed Counts 4, 5 and 6.

6. Whether the court (R 160) with respect to Counts 1 and 2 has put too heavy a burden on appellant beyond that of reasonable apprehension in requiring appellant as a lay witness to know by his own knowledge that the Committee merely wanted general information.

7. Whether as to Counts 8, 9 and 10 appellant was entitled to be apprehensive of waiver where there were repeated attempts to entrap and bait appellant, and repeated assurances to the appellant that he had previously waived his privilege.

8. Whether or not after an answer which gave a lengthy explanation of the appellant's work (R 108), and which was clearly not pertinent, with respect to related questions asked immediately thereafter (R 108-112 incl.) involving questions pertinent on their face because they were phrased to involve the use of terminology involving communism, the appellant had a right to "stop short" and be apprehensive as to waiver; whether thereafter the continued questions on the same subject, in context, became pertinent so as to justify the District Court in its refusal to dismiss as a matter of law Counts 8, 9 and 10; did the Congressional Resolution, (plaintiff's Exhibit 2; Pub. Law 601) (R 19)

authorize the inquiry behind said questions in Counts 8, 9 and 10.

9. Whether or not in view of the fact that the Committee already had in its files the answers to questions represented by Counts 8, 9 and 10 they were insignificant in terms of legislative evaluation.

10. Whether or not it was necessary for the appellant under the evidence, to show "employment" by the Communist Party, as suggested by the trial court (R 174-177) in order to claim the privilege as to Counts 1 and 2.

SPECIFICATION OF ERRORS

I

The District Court erred in its failure to find that appellant was deprived of his rights under the Fifth Amendment in that he was deprived of a fair hearing, was deprived of his liberty and property without due process, and was being held to answer under the guise of a legislative investigation for capital, or otherwise infamous crimes contrary to the provisions of the Fifth Amendment.

II

The District Court erred in its failure to find as to Counts 1, 2, 8, 9 and 10 that the refusal of the appellant to answer under the circumstances surrounding the hearing was justified and in its failure to find that

the plaintiff had not proved beyond a reasonable doubt that appellant's refusal was a deliberate, intentional, capricious and arbitrary refusal, constituting criminal intent as required by Title 2, Section 192.

III

The District Court erred as a matter of law as to Counts 2 and 8 in failing to find that the appellant should be acquitted for failure of the Committee to direct the appellant to answer the question.

IV

The District Court erred in holding that the appellant had waived his Constitutional privilege against self incrimination with respect to the questions on which Counts 8, 9 and 10 of the indictment were based by having answered routine identification questions involving non-incriminating matters. (R 167, 168).

V

The District Court erred in its failure to find under the evidence that the Committee already had the answers in its records and files to the questions represented by Counts 8, 9 and 10 and that its purpose in asking said questions was in context with Count 7 and was but another repeated effort by the Committee to force the witness into waiver; that aside from waiver and threat of perjury charges, the answers in themselves were not pertinent.

VI

The District Court erred with respect to Counts 1 and 2 in ruling that the questions did not call for incriminating information which might form a "link in a chain of evidence" and in holding that appellant must prove "employment" by the Communist Party to avail himself of the privilege (R 174-177).

VII

The District Court erred in failing to find under the evidence:

1. That the appellant was justified in feeling reasonable apprehension as to Counts 1, 2, 8, 9 and 10;

2. That the answers to questions involved in Counts 1, 2 (R 174), 8, 9 and 10 would tend to incriminate him or furnish a link in a chain of evidence which would tend to incriminate him;

3. That the answers would expose him to charges of perjury on matters beyond his control, (R 168-169) (R 86);

4. That answering Counts 1, 2, 8, 9 and 10 might constitute "waiver."

VIII

The District Court erred in refusing to dismiss Counts 1, 2, 8, 9 and 10 and in holding that the claim of privilege against self incrimination was not properly in-

voked and that true answers to the questions in said counts did not reasonably involve any threat of self incrimination, and that the appellant was required under existing law to have answered. (R 180).

IX

The District Court erred after dismissing Counts 3, 4, 5 and 6 in its failure to find that Counts 1 and 2 were in context a part of the question represented by Count 3 and refusing to likewise dismiss Counts 1 and 2.

X

The District Court erred in ruling that the appellant did not have a right to "stop short" as to Counts 8, 9 and 10 when a further answer might involve incriminating matter, especially when these counts were related to dismissed Count 7 and were rephrased to delete references to the Communist Party (the court so stated as to Count 8, [R 162]); and especially so when "waiver" was being sought by the Committee; and further, when such questions were not related to a legislative purpose, involved answers of minor value, and which to a large extent the Committee already had.

XI

The District Court erred in substituting for reasonable apprehension by the appellant a positive duty to know absolutely that an answer to the questions in Counts 1 and 2 would not incriminate or tend to incriminate, especially in view of the uncertain state of

the law regarding waiver if any answers be given.

XII

The District Court erred in ruling that the questions represented by Counts 8, 9 and 10 were pertinent to a legislative inquiry.

XIII

The District Court erred in its failure to find under the evidence that the Committee already had the answers in its records and files to the questions represented by Counts 8, 9 and 10 and that its purpose in asking said questions was in context with Count 7 and was but another repeated effort by the Committee to force the witness into waiver; that aside from apprehension of waiver and possible perjury charges, the answers in themselves were not pertinent other than for further identification, matter that had all been secured early in examination of the witness.

SUMMARY OF ARGUMENT

Under the conditions of the hearing appellant was deprived of his rights under the Fifth Amendment to:

1. A fair hearing.

2. Not be deprived of his liberty and property without due process of law;

3. Not be held to answer for capital and infamous crimes contrary to the provisions of the Fifth Amendment.

The plaintiff failed to prove beyond a reasonable doubt that appellant's refusal to answer was the deliberate intentional refusal constituting criminal intent required under Title 2 U. S. C., Section 192.

The Committee failed to direct the appellant to answer Counts 2 and 8.

The appellant properly claimed his privilege not to testify against himself; he did not waive his privilege by giving non-incriminating answers; further, that answers to non-pertinent identification questions did not constitute waiver as waiver is defined in contempt hearings so as to hold the appellent in contempt for not further answering; especially so where the questions were not asked in good faith and were for harassment and exposure; and furthermore, that the appellant was justified on account of the attitude of the Committee to be afraid and to give up answering on non-pertinent matters because of the harassment; and such refusal is not contempt as defined under Title 2, Section 192.

The privilege was properly invoked as to Counts 1 and 2 which were in context with dismissed Counts 3, 4, 5 and 6 as to time and subject matter; furthermore, the statements of Committee counsel is clear proof that the purpose of the Committee was to get testimony involving alleged Communist activities of the appellant, his testimony regarding matters "since 1935,"

that said matters could have exposed appellant to possible perjury charges involving persons and details as much as 19 years old.

The trial court was not justified in substituting for reasonable apprehension a duty on the part of the appellant to know what the Committee had in mind as to Counts 1 and 2.

As to Counts 8, 9 and 10, the answers called for could in no way be pertinent to the question under inquiry as defined under the statute, to wit: House Resolution No. 5, being plaintiff's Exhibit 2, Law 601, 2d Session, 83d Congress. These questions were not only not pertinent on their face but after an answer by appellant describing his occupation (R 108) the further questions thereon were clearly no longer pertinent.

For appellant to have answered the questions involved in Counts 8, 9 and 10 about his office, his business associates, and the name of the group would, under the television, radio and newsreel conditions of the hearing have deprived him and his associates of property rights by exposing them to the opprobrium which the Committee was deliberately fostering; it would have been damaging and devastating to their business. This would have occurred without due process protection and without the equal right to answer charges under the same facilities.

The risk of perjury following conflicts in detailed testimony of other witnesses, together with a new apprehension which is appearing in the law, to wit: apprehension of waiver, are themselves great risks which no court should compel appellant to run in order to invoke Constitutional restraints designed to control despotic actions by an arm of the government.

Finally, the courts must not retreat from their positive duty to judicially review the methods, conduct and acts of this arm of government when the rights of citizens are infringed upon; that whereas the President and the Executive Department, and the Judiciary, find it possible to protect themselves in terms of the separation of powers, it is becoming more difficult for citizens to be protected against Congress using convenient formulas of national welfare, anti-subversion or anti-communism to support its ever-widening assaults. The courts must compel Congressional Committees which in effect carry on trials, usingthe powers of subpoena, and punishment by "exposure" and publicity, to furnish due process to the individuals being summoned before such committees.

ARGUMENT

SPECIFICATIONS OF ERROR NUMBER 1 AND 2 (APPELLANT DEPRIVED OF (a) FAIR HEARING, (b) OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS, AND (c) HELD TO ANSWER FOR INFAMOUS CRIME—ALL CONTRARY TO THE

FIFTH AMENDMENT; AND ERROR 2: REFUSAL WAS JUSTIFIED BECAUSE OF "SETTING.")

(a) WAS THE APPELLANT DEPRIVED OF A FAIR HEARING—Despite evidence in the Committee record and published by the Committee (Defendant's Exhibit A-3, and excerpts in Appendix "A") that appellant was an ex-communist with reason for apprehension in the Committee hearing, the Committee treated him in a hostile and accusatory fashion.

Defendant's Exhibit A-3, being Pamphlet Part 3, Page 6232 (App. "A") contains the following answer to the Committee by convicted Smith Act defendant, Barbara Hartle:

> "Mrs. Hartle: . . . When Harvey Jackins was expelled, I heard a discussion seriously held as to what his wife would do—go with him to the "enemy" or stay with the party. The Jackins have 3 or 4 children . . ."

Other witnesses had identified him before the Committee during the course of the hearing and in executive session (R 41-47). See Exhibit A-2, (App. "A,") Pamphlet, Part 2, Page 6067 and Page 6094. Also see Exhibit A-1, (App. "A,") Pamphlet, Part 1, Page 6027 and Page 6003-6004.

Appellant put in evidence Exhibits A-6 to A-10, consisting of newspaper articles, (Appendix "C,") one of which contains a photograph of appellant Jackins and all imputing to the appellant communist activities run-

ning from March 28, 1941, through January 16, 1948. In addition, appellant's Exhibit A-11 (R 73-75) consists of photostats of pages from a report by the Canwell Committee, an authorized committee of the 1947 legislature of the State of Washington investigating un-American communist activities. These photostatic excerpts mention and describe appellant Jackins as a member of the Communist Party and identify him with numerous named communists (Appendix "D").

Counsel for the Committee also stated:

> "Mr. Chairman, it is my purpose to inquire of this witness as to what knowledge he had regarding Communist Party activities in connection with certain unions of which he was a member or had official positions with. . . ." (R 94).

The above is set forth here to show that appellant had much to fear. His efforts to protect himself under the Constitution can be understood in the light of the above. Consequently, the reception he received from the Committee in the light of the above shows an unfair hearing, harassment, and a studied effort to submit appellant to opprobrium before a wide television and radio audience.

The Committee addressed the appellant:

> "Mr. Clardy . . . (R 91) And I am sure he is not claiming it in good faith but is attempting merely to filibuster and to follow the usual Communist Party line and now I ask that he be directed to answer."
>
> . . .

"Mr. Clardy . . . (R 92) And we don't care for any thanks or anything else from you."

. . .

"Mr. Jackson . . . (R 93) It is quite obvious that the witness has no intention of answering any questions which have to do with his alleged membership in the Communist Party; and I think it is simply a waste of time of the Committee and of the audience to pursue it any further. As far as I am concerned you can ask him the question now and excuse him from the stand."

. . .

"Mr. Velde . . . (R 94) Are you a member of the Communist Party?"

. . .

"Mr. Velde . . . (R 94) Have you ever been a member of the Communist Party?"

. . .

"Mr. Scherer . . . (R 97) Witness, isn't it a fact that you were expelled from all three of these unions because of your Communist Party activities within the unions? Isn't it a fact?"

. . .

"Mr. Scherer . . . (R 97) Were you on the Communist Party payroll?"

. . .

"Mr. Scherer . . . (R 97) Isn't it a fact that you have refused to answer the questions as to your previous employment because you were on the payroll of the Communist Party in this country during those years?"

. . .

"Mr. Scherer . . . (R 98) All right, Witness, tell me what part of the statements I have just made

are false then?"

. . .

"Mr. Clardy . . . (R 98) Was there any reason, other than that cited by Mr. Scherer, for your expulsion from those three unions?"

. . .

"Mr. Clardy . . . (R 98) Did you ever engage in any espionage activities for the Communist Party, Witness?"

. . .

"Mr. Clardy . . . (R 98) You mean you won't even answer the question whether or not you have engaged in any espionage activities? Is that correct?"

. . .

"Mr. Jackson . . . (R 99) Would a true answer to that question tend to incriminate you? Would a true answer to the question as to whether or not you have ever engaged in espionage activities tend to incriminate you?"

. . .

"Mr. Jackson . . . (R 99) Yes, we understand the provisions of the Fifth Amendment very well. We learned it before you learned your lines on it. The question is, Would a truthful answer to the question whether or not you have ever committed espionage tend to incriminate you?"

. . .

"Mr. Doyle . . . (R 99-100) Were you excused during those years for any reason from military service, or why didn't you serve? Would that incriminate you, too, if you told the truth in that regard?"

. . .

"Mr. Jackson . . . (R 104) Which judgment will be passed again comes the revolution. That we are trying to prevent."

. . .

"Mr. Tavenner . . . (R 106) Have you ever been a member of the Communist Party?"

. . .

"Mr. Clardy . . . (R 110) Have you ever been a member of any organization whose avowed purpose is to overthrow this Government through the use of force and violence?"

. . .

"Mr. Doyle . . . (R 113) Well, do you have one on you? Will you please give it to counsel? You carry a business card, don't you? A professional card? Why don't you answer honestly on that?"

Coupled with the next examples of the Committee's work set forth below involving efforts to entrap the witness into waiver, the record makes one of the most shocking spectacles of an unfair hearing that could come before any Circuit Court.

After exercising his privilege as to the question represented by Count 1, which inquired as to appellant's employment record "since 1935," and after a direction from the Committee to answer the question, the Chairman of the Committee, Mr. Velde, stated:

"Mr. Velde . . . (R 85) Certainly, that is a very simple question and the Chair *sees no way in which that would incriminate you to answer it* whatsoever, and you are directed to answer the question, sir." (Emphasis added.)

The question was asked approximately *6 times* (R 85-87) during the course of which Mr. Velde also stated:

> "Mr. Velde . . . (R 86) Mr. Witness, the *testimony of the previous witness has nothing to do with your testimony whatsoever.*" (Emphasis added.)

On the fifth asking by Mr. Velde, he asked the appellant . . . "You still refuse to answer upon the grounds of the Fifth Amendment? Is that correct?" The witness replied, "I have answered that very clearly, Mr. Chairman." Mr. Velde then replied:

> "Mr. Velde . . . (R 87) Now, how do you mean that you have answered very clearly? By refusing to answer? *Can you tell me of one way in which your previous employment*—I mean giving us the benefit of your previous employment—*could incriminate you?*" (Emphasis added.)

These assurances by the Chairman that there would be no link in a chain of evidence furnished by the answer, and his request to the appellant to show in one way how the answer could incriminate the appellant, is certainly entrapment at its worst.

Although Counts 3, 4, 5, 6 and 7 were dismissed, still they must be examined to note the continuation of the tactics which constitute further proof of the unfair nature of the hearing. On Count 3 the appellant offered to discuss the subject but not under oath before the Committee. This offer became the subject of a claim of waiver by Mr. Clardy (R 89-90). Later (R 91)

Mr. Velde and Mr. Clardy engaged in a discussion as to whether or not the offer of the appellant to discuss the subject before an audience but not under oath was or was not a waiver. The Chairman said it was not and Mr. Clardy said it was.

When the appellant claimed his privilege to the question asked in Count 4, the Chairman directed him to answer the question and stated (R 95):

> "The Chair can see *no reason why the answer to* such a question *should incriminate you in any way.* You are directed to answer the question." (Emphasis added.)

The District Court at the trial below upheld the privilege and was thus in agreement with the appellant and in disagreement with the Chairman, Mr. Velde.

To a question intervening between Count 5 and Count 6 (R 96) "Were you . . . expelled from Lodge 751 . . . ," the Chairman, Mr. Velde, again directed the appellant to answer and stated:

> *"Again the Chair, and* I am sure the *members of the Committee, sees no reason why you could possibly be incriminated by an answer* to that question . . " (Emphasis added.)

Then follows questions about the Communist Party, membership, being on the payroll, being expelled from three unions for Communist Party activities, espionage, as set forth above.

When the appellant answered (R 107) a question proposed by Mr. Clardy which involved an answer describing the appellant's occupation, at the conclusion Mr. Clardy asked (R 108):

> "Mr. Clardy . . . May I ask you who do you mean by "we"? Is this something originated by the Communist Party as part of its program."

Again the appellant is assured that there can be no possible incrimination. Nothing is said about furnishing a link in a chain of testimony nor about an invitation to perjury. The record discloses (R 109) audience laughter, and the Chairman admonishes the audience. Then Mr. Clardy asked that the Chairman direct the appellant to answer the last question, but Mr. Velde stated that he was sorry he didn't remember the last question and requested the reporter to read it. Note the confusion out of which Counts 7 and 8, and, by context, 9 and 10 are grounded.

Thus Mr. Clardy asked (R 108) "May I ask you, who do you mean by 'we'? Is this something originated by the Communist Party as a part of its program?" The reporter read back "Is this something which originated by the Communist Party as a part of its program?" And Mr. Clardy asked that the witness be directed to answer that question. The privilege was again claimed. According to defendant's Exhibit No. A-14-A, Mr. Clardy asked (R 110): "Who are the other

people then when you used that word "they" that are associated with you in this movement?" And this was made the basis for Count 8.

Defendant's Exhibit No. A-14-A is a transcript of the tape recording of the radio broadcast of the hearings.

If we note that defendant's Exhibit No. A-14-A shows that the question represented by Count 8 was by its variance in "we" and "they" not asked at all, it creates even more confusion.

Then followed a question by Mr. Clardy (R 110): "Very well. Are those that you associate with the persons that have been identified in this proceeding as members of the Communist Party?" Here again we have an invitation to waiver, to perjury charges. Does appellant know all the persons "identified in this proceeding"? What proceeding?

There was unfairness involved in the Committee's attempt to manipulate appellant's answers into "waiver."

Mr. Doyle (R 111) advised the appellant that he had waived his privilege under the Fifth Amendment by answering on his occupation. With Mr. Doyle's assurance that there had been a waiver, there is validity to appellant's being alarmed and frightened over the prospect of waiver. At the conclusion of the appel-

lent's long explanation on his employment it was Mr. Clardy who introduced the subject of communism (R 108). This introduced a danger in discussing the subject of communism. In fact, the appellant's fear looks well founded in terms of the assurances he later received from Mr. Doyle that there had been a waiver. Because of the tactics and the unfair nature of the hearing and the efforts to entrap the appellant into waiver, can it be said that there was present the willfulness required under the statute in the failure of the appellant to answer the questions represented by Count 9, "But what is the name of the group?," and Count 10, "Does the group that you referred to have an office with you in the same office that you work in?"

The statement of the appellant (R 111-112) following Mr. Doyle's statement that he had waived his privilege is quoted here for purposes of comparison with the most famous English case. The appellant stated:

> Mr. Jackins:
> "Sir, I believe that the Committee has sought to involve me in a trap on this question."
>
> Mr. Jackins:
> "Were I to decline to answer the question, certainly it is conceivable that I will be threatened with contempt charges. On the other hand, to answer it would lead to all sorts of other involvements as I have tried to explain previously so that in the circumstances I have no choice but to de-

cline to answer the question, invoking my privileges under the Fifth Amendment to not bear witness against myself."

Wigmore (*VIII Wigmore on Evidence* (*3d Ed.*) 291, Sec. 2250) discusses the great English case of John Lilbourn which led to the ~~appellation~~ abolition of the Star Chamber Court and crystallized the privilege in England. He cites Lilbourn as stating at his trial:

> "I am not willing to answer you any more of these questions because I see you go about this examination to ensnare me, for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and, therefore, if you will not ask me about other things laid to my charge I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think *by the law of the land*, that I can stand upon my just defense and not answer to your interrogatories." (Emphasis added).

As a result of Lilbourn being whipped and pilloried the whole of England became incensed at the indecency and the torture. Within ten years his complaint to Parliament resulted in the House of Lords ordering that the sentence "be totally vacated, as illegal and most unjust, *against the liberty of the subject, the law of the land, and Magna Charta*," and he was allowed 3000 pounds in reparation. (Emphasis added).

Lest it be overlooked,appellant notes that in the *Lilbourn* case the legislature stopped the inhuman practice by the courts. The issue before the court in the in-

stant case is quite the reverse. Our court is being asked to restrain the legislature. The history of the United States Legislature for several decades has revealed constant and continual erosion of civil liberties of citizens. There is a clear unwillingness of the judiciary to interfere. The error is the assumption that the United States Government is comprised of either the legislature on the one hand, or the executive on the other hand, instead of keeping firmly in mind that the judicial and the legislative and the executive each comprise coequal and independent branches of what is the United States Government. This error appears in *Emspak v. U. S.*, infra, page 591, where it is stated:

". . . the Government expressly conceded." The phrase "Government" is used constantly throughout the *Emspak, Quinn* and *Bart* cases, infra, instead of "plaintiff" which is the executive arm representing the legislative.

There has been a too easy presumption that a Legislative Committee is in good faith seeking information for legislation purposes if they so claim.

The constitutional restraints in the Bill of Rights for the protection of the individual against the legislative are difficult to secure because of this broad presumption plus a formula in a Congressional Resolution reciting something about "subversion," etc.

Mr. Justice Reed dissenting in *Quinn v. United States,* supra, page 582, states: "In the context of this testimony, the adoption by Mr. Quinn of Mr. Fitzpatrick's reference to the First and Fifth Amendments smack strongly of a 'due process' Fifth Amendment claim." In the instant case appellant does not just suggest but actually claims lack of due process.

Although we are involved in discussing Specification of Error No. 1, the discussion of whether or not appellant was accorded a fair hearing now leads us directly into a discussion of SPECIFICATION OF ERROR NO. 2.

In *U. S. v. Kleinman* (1952), 107 F Supp. 407, the court, in discharging defendants indicted for contempt for refusal to answer questions of a Senate Committee investigating organized crime, said:

> "When the power of the court to punish is invoked, it necessarily follows in order properly to determine the guilt or innocence of the accused, that the court must examine the entire situation confronting the witness at the time he was called upon to testify. Only thus can it be determined whether his refusal was capricious and arbitrary and therefore a willful, unjustified obstruction of a legitimate function of the legislature or was a justifiable disobedience of the legislative command . . .
>
> In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with concomitant

flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.

Under the circumstances clearly delineated here, the court holds that the refusal of the defendants to testify was justified and it is hereby adjudged that they are not guilty."

In *Aiuppa v. U. S. (1952)*, 201 F. 2d 287, 300, the Court in reversing a judgment directing an acquittal of an appellant for refusal to answer questions of a Senate Crime Investigating Committee, said:

". . . we are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment by a committee of the United States Senate of methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of Federal Law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment. In our humble judgment, to place a person not even on trial for a specified crime in such a predicament is not only a manifestation of unfair play, but is in direct violation of the Fifth Amendment to our national Constitution."

Mr. Justice Brandeis in *Journey v. MacCracken,* 294 U. S. 125, 147-48, 150 (1935) declared that any fear that Congress might abuse its powers is "effectively

removed by the decisions of this Court which hold that assertions of Congressional privilege are subject to judicial review."

The Notre Dame Lawyer (Vol. XXIX, No. 2, (Winter 1954), page 257), published 5 articles containing addresses delivered at a symposium on safeguards for witnesses at legislative investigations. The article by *Telford Taylor, "Judicial Protection Against Abusive Practices,"* states:

> "The courts will undoubtedly hold that such efforts to conclude a legislative inquiry into a tribunal for the trial of criminal charges violate the doctrine of separation of powers, and that the witness (quite apart from the privilege against self-incrimination) could not be required to answer."

That the courts are being pressed to recognize and curb abhorrent practices of legislative committee investigations appears from the following: In *U. S. v. Charles Nelson*, 208 F 2d 505, 512, 513, the Court of Appeals, speaking through Judge David Bazelon, held:

> "Nelson's freedom of choice had been dissolved in a brooding omnipresence of compulsion. The committee threatened prosecution for contempt if he refused to answer, for perjury if he lied, and for gambling activities if he told the truth . . .
>
> . . . If there is anything to suggest that a Congressional Committee's hearing is less awesome than a police station or a District Attorney's office, and should therefore be viewed differently, it has escaped our notice. The similarity has become more apparent as 'investigated' activities of Con-

gress have become less distinguishable from the law enforcement activities of the Executive."

A *Tulane Law Review* article entitled *"Congressional Investigations: Rights of Witnesses,* Vol. 26, page 381, at page 387, somewhat summarizes the gathering weight of opinion which the courts must begin to recognize in the following language:

> "Few persons contend that the courts should prescribe rules of procedure for the conduct of Congressional hearings. On the other hand, it is difficult to conceive how a witness can be found in contempt or sentenced for a criminal offense for refusing to acquiesce to demands and conditions which infringe his recognized rights and which hold little promise of a compensating advantage to the governmental process. Since the risk which is inherent in a refusal to comply with an order of a Congressional Investigating Committee will deter frivolous assertions of rights, there would appear to be no valid reason for refusal to recognize a defense based upon prejudicial conduct of a hearing.
>
> Furthermore, most of the deficiencies and excesses of Congressional hearings can be corrected by the investigators themselves. However, the courts should not criminally punish a witness who has withheld impertinent or privileged information or who has refused to answer questions which are asked under conditions that render them unreasonable."

Reference is again made to the gathering weight of opinion in an article by *William T. Gossett*, Vice President and General Counsel of the Ford Motor Co., in 38 A. B. A. J. 817 entitled "Are We Neglecting Constitu-

tional Liberty? A Call to Leadership."

> "Congressional investigations which delve into matters of personal conduct assume the aspect of a trial and thus abridge the rights of individuals, guaranteed by the Constitution."

Extended portions of this important article are included in the Appendix to this brief (Appendix "F").

Consider too the following comments by *Erwin N. Griswold* in *"The Fifth Amendment Today"* (Harvard University Press, 1955, Library of Congress, Catalogue Card No. 55-6809). Mr. Griswold is Dean and Langdell Professor of Law, Harvard Law School.

> "When we come to legislative investigations, however, we have a wholly different situation. Here, nearly every safeguard which has been developed over the centuries by our courts is thrown out the window. We are told that a legislative committee is not a court, and that court rules do not apply. We are told too that a committee or sub-committee is only conducting an investigation, not a trial, and that Congress or a legislature would be severely hampered in its law-making function if it were bound by cumbersome court rules. The situation is surely different. Indeed, experience has taught us that the risks are very great in legislative investigations, which might suggest that this was a place where even greater safeguards should be imposed. At any rate none of the reasons given would seem to be an adequate ground for not recognizing that the rights of the individual, established after so long a struggle, are just as precious before a legislative body as they are in court. (Page 62, 63).

Mr. Griswold discusses the two phrases "the law of

the land" and "due process of law," indicating that the purpose of these provisions was to protect the subject from oppressive uses of authority, and quotes from Lord Coke:

> "Every oppression against law, by colour of any usurpt authority is a kind of destruction, . . .: and it is the worst oppression that is done by the colour of justice." (Coke, Second Institutes, 1656, P. 48).

Griswold continues to show (page 37) that perhaps the essential thought behind due process is that it has some application wherever men feel a sense of injustice.

> "Thus it becomes a chief source of support for individual liberties. What is liberty? Is it not freedom or protection of the individual against arbitrary or improper exercise of the organized power of the state? What is a tyrant? Is he not a man who exercises the collective power of the state in an arbitrary, capricious, or purely selfish manner? Such words as 'arbitrary' and 'capricious' are difficult words. They may not in fact mean much more than 'unreasonable' and that in turn may mean in substance 'not customary' or not what we are accustomed to. Perhaps it may be said that we are accustomed to decent treatment from our public officers, an that our hearts and minds recoil when that custom is broken. It is with this sort of thing that the idea of due process, of 'the law of the land' is concerned . . .
>
> I think it fair to say that a large section of the public has from time to time felt 'a sense of injustice' with respect to some of these hearings; and if they have, then there is a situation where the ancient ideal of due process is involved. A failure to appreciate the intimate relation between sound

> procedure and the preservation of liberty is implicit, may I say, in that saddest and most short-sighted remark of our times: 'I don't like the methods, but . . .' for methods and procedures are of the essence of due process, and are of vital importance to liberty. As Mr. Justice Brandeis wrote some 30 years ago, 'in the development of our liberty insistence on procedural regularity has been a large factor' *Burdeau v. McDowell,* 256 U.S. 465, 477 (1921). More recently Mr. Justice Frankfurter has put the same truth in these words: 'The history of liberty has largely been the history of observance of procedural safeguards'. *McNabb v U.S.* 318 U.S. 332, 347 (1943).

Mr. Griswold continues, page 41, that the election of a man to Congress does not make him a magistrate nor vest him with any power over his fellow citizens. And that the power of investigation belongs to the collective body. And,

> "The fact is that, for practical purposes, the House of Representatives and the Senate are regarded by their members as clubs—of which the Senate is, of course, the more exclusive. Each member of the House or Senate has his own standards and in a great many cases these standards are very high. But with almost no exception no member seeks to impose his standards on any other member. Once you are in the club, how you act is up to you, and no member wants to undertake to interfere in the conduct of any other member—partly, I suppose, because he does not want anyone else to interfere with him. This is unfortunate, I think, though perhaps natural and understandable."

(b) (continuing discussion Specification of Error No. 1, WAS THE APPELLANT DEPRIVED OF LIBERTY AND PROPERTY WITHOUT DUE PROC-

ESS UNDER THE FIFTH AMENDMENT.) All of the discussion above under (a) and which included a discussion of Specification of Error No. 2 is incorporated and adopted as being pertinent to this part of the argument. Counts 8, 9 and 10 required the appellant to name his business associates, his and their office addresses and the name under which the counselling group operated. The Supreme Court in the *Emspak* case, supra, noted that the "government" recognized that opprobrium resulted from claiming the privilege. Under the compulsion of the hearing to which appellant was subjected, he was not only exposed to opprobrium before a large number of people listening to and watching radio and television but he was deprived of his liberty to answer the charges made and to be represented by effective counsel.

A man's right to work is one of his liberties under the Fifth Amendment and to be deprived thereof without a fair trial has been heldto be a denial of due process. *Peters v. Hobby,* October Term, June 6, 1955, Vol. 99, No. 14, Adv. Rep. Supreme Court Law Ed., page 677.

The appellant was "deprived of life, liberty, or property, without due process of law,". Considering the fact that his testimony was compelled before this proceeding without the protections afforded in a fair hearing, and considering the fact that Counts 8, 9 and 10

involved the name of his then business associates, and the name of the group, and whether the group had an office in the same office that appellant worked in, it would appear clear that the opprobrium attached to the appearance of the appellant would have seriously injured his property rights and his business, if he had named his associates, the group, and their offices under these conditions. He and his associates would have been subjected to loss of reputation and public goodwill in their business, to say nothing of embarrassment and interference with their right to work. See *Peters v. Hobby, supra*. To run this risk in a proper hearing with due process is perhaps inevitable but to run it without due process protection is unfair and unreasonable and prejudicial.

Due process is a guarantee to a person of a fair hearing when he is being deprived of life, liberty or property. In the sense that appellant was being subjected to broadcasted hearing seen by a great number of people on television, an involuntary radio and newsreel appearance, where neither he nor his counsel could answer accusations made by the Congressmen or their Committee counsel nor make argumentative explanatory statements and where there was no equal opportunity, it might be argued that appellant's liberty included the right not to be exposed to such a public hearing; and not to have his private affairs examined into

at such a hearing.

(c) Appellant was being held to answer for capital and infamous crimes.

The infamy arising from broadcasted hearings has been argued heretofore, as has also the premise that legislative hearings such as appellant was subjected to are actually trials. Can it be possible that we have reached the point in this country where a legislative body can evade the Constitution and do what cannot be done before the courts?

Does it not gainsay the question to dispose of it with the statement that this provision of the Fifth Amendment only calls for a presentment or indictment before a Grand Jury, before a citizen can be put on trial before a court? Is not a court the only place where appellant should have been held to answer for the crime of espionage, and to give evidence needed for a Smith Act violation?

In appellant's case appellant was held to answer for an infamous crime, was accused without a fair hearing or a chance to protect himself. If a citizen cannot be held to answer for these crimes before a court without constitutional safeguards, how, then, can he be held to answer before a legislative committee?

SPECIFICATION OF ERROR NO. 3

(APPELLANT WAS NOT DIRECTED TO ANSWER QUESTIONS REPRESENTED BY COUNTS 2 and 8.)

Nowhere in the record is there a direction to answer the questions represented by Count 2. On the authority of the recent cases decided by the Supreme Court, to wit: *Emspak v. U. S.,* and *Bart v. U. S.,* and *Quinn v. U. S., supra,* it is now the law that Section 192 requires a criminal intent in a deliberate, intentional refusal to answer and that in the absence of a specific direction to answer, a "witness' refusal to answer is not contumacious, for there is lacking the requisite criminal intent . . ." *Quinn v. U. S.,supra,* page 573.

Elsewhere in this brief, page 24, it has been shown that as to the question represented by Count 8 there is a confusion as to whether the question was asked, the word "we" appearing in Count 8 taken from plaintiff's Exhibit 7 (R 25, 36) appears as "they" in defendant's Exhibit A-14-A (R 62) which was the voice tape recording. The record (R 62, 162) discloses the attempt of appellant to convince the trial court of the error involved.

Nowhere in the record is there a direction to answer the question represented by Count 8, even accepting the form in which it appears in plaintiff's Exhibit 7. (R 25 The question was asked, the privilege claimed, and the interrogation proceeded without direction to answer

the question.

SPECIFICATION OF ERROR NO. 4

(THE APPELLANT DID NOT WAIVE THE PRIVILEGE WITH RESPECT TO COUNTS 8, 9 and 10.)

Prior to the asking of the questions on which Counts 7, 8, 9 and 10 of the indictment are based, the appellant had discussed at length the nature of his occupation (R 108). After this discussion Congressman Clardy asked: (R 108)

> "May I ask you, who do you mean by 'we'? Is this something originated by the Communist Party as part of its program?"

After a colloquy, Congressman Clardy asked appellant the question: (R 110)

> "Who are the other people, then, when you use that word ('we') ('they') that are associated with you in this movement?"

Appellant refused to answer, claiming his privilege under the Fifth Amendment. Then Congressman Doyle said:

> "You are the one that volunteered that your present occupation was working with a group, and in my book that is a waiver of your privilege under the Fifth Amendment.
>
> But what is the name of the group?"

The appellant then said:

> "Sir, I believe that the Committee has sought

> to involve me in a trap on this question. Were I to decline to answer the question, certainly it is conceivable that I will be threatened with contempt charges, but, on the other hand, to answer it would lead to all sorts of other involvements, as I have tried to explain previously; so that in the circumstances I have no choice but to decline to answer the question, invoking my privileges under the Fifth Amendment not to bear witness against myself."

Obviously, up until the time Congressman Clardy injected into the discussion the suggestion that appellant's business was "something originated by the Communist Party", the appellant was attempting to answer questions concerning his present work and occupation. When the Committee sought to connect his business with the Communist Party and told him he had waived his privilege under the Fifth Amendment, what was the appellant to do? As the courts have said:

> "To sustain the privilege it need only be evident from the implications of the questions and the setting in which is is asked that a responsive answer or an explanation of why it can not be answered might be dangerous because injurious disclosure could result." *Hoffman v. U. S.*, 341 U. S. 479, 486.

One Congressman told the appellant that "in his book" he had waived his privilege. Chairman Velde told the appellant:

> "There is no possible way that you can incriminate yourself by an answer to that question."

Even the members of the Committee did not agree.

The appellant, a layman, had real cause for apprehension, and he had the right to protect himself by invoking his privilege not to testify as to facts which might tend to incriminate him, or which might be used as a further basis for the Committee to claim waiver. The appellant had willingly answered questions regarding his occupation. It was the Committee, by its injection of communism into the discussion which raised the question of whether the appellant should "stop short" and "determine that he will go no further", in the words of *McCarthy v. Arndstein,* 262 U. S. 355.

Considering the long answer of the appellant and his frankness in discussing his work, and considering its non-relevancy to the subject under inquiry and the insignificance of the answers which were already largely in the record (R 49, plaintiff's Exhibit 7) the words of Chief Judge Magruder of the First Circuit, in *Maffie v. U. S.,* (1954) 209 F. 2d 225, are particularly apt.

> "We would be reluctant to uphold a conviction for criminal contempt based upon a refusal to obey the district court's order so far as this insignificant residue is concerned; it would be too much like case of a tail wagging a dog."

There was obvious confusion on the part of the court and counsel for plaintiff in trying to apply the case of *U. S. v. Rogers,* 340 U. S., 367 (R171-174). The court did not recognize that appellant had not discussed incriminating matters but the court held that there was

a waiver anyway and that appellant was thus wilfully and contumaciously refusing to answer the questions represented by Counts 8, 9 and 10. It is clear that in the *Rogers* case the only reason there was held to be a waiver was because the witness had fully discussed incriminating matters.

There was absolutely nothing in the previous answers of the defendant concerning his work which involved incriminating matters. As a matter of fact, it is ironical to consider the court's statement that appellant had earlier waived his right not to answer these questions (R 167) because appellant had early in the hearing (R 87) said he was employed as a personal counsellor. Was the court suggesting that in order not to have committed waiver he should have refused to answer the question "How are you now employed, Mr. Jackins?"? Later, when appellant does refuse to answer Counts 1, 2, 8, 9 and 10, the trial court held him in contempt for not answering.

Appellant at this point incorporates the argument set forth hereunder in Specification of Error No. 10 concerning waiver and context (this brief, page 54-58).

SPECIFICATION OF ERROR NUMBERS 5, 6, 7, 8 and 9 (Counts 1 and 2 were within the privilege against self-incrimination under the Fifth Amendment and, in addition, were in context as to time and subject with dismissed counts; as to Counts 1, 2, 8, 9 and 10, appellant was exposed to waiver, and danger of perjury charges on matters

beyond his control;) THE REFUSAL TO ANSWER WAS JUSTIFIED.)

It is clear that the appellant had a reasonable apprehension that any testimony by him as to alleged activities could involve him in (1) waiving the privilege; (2) exposing himself to possible perjury charges, and (3) to furnishing evidence which might be used against him in a criminal proceeding.

Count 1 was based on the question: "Will you tell the Committee, please, briefly, what your employment record has been since 1935?"

Count 2 was based on the question: "How were you employed in 1948?"

Count 8 was based on the question: "Who are the other people, then, when you use the word ('we') ('they') that are associated with you in this movement?"

Count 9 was based on the question: "But what is the name of the group?"

Count 10 was based on the question: "Does the group that you referred to have an office with you in the same office that you work in?"

THE COURT DID DISMISS the following counts:

Count 3: "Did you hold an official position in 1948 or at any time prior thereto in Local 46 of the Interna-

tional Brotherhood of Electrical Workers?"

Count 4: "Now were you expelled from Local 46 of the International Brotherhood of Electrical Workers in 1948?"

Count 5: "Were you also expelled as Business Agent of the Building Service Employees Union sometime prior to 1948?"

Count 6: "Were you at any time expelled from Lodge 751 of the Aero Mechanics Union?"

Count 7: "Is this (work of personal counseling) something originated by the Communist Party as part of its program?"

Calendar dates "Since 1935" and "1948" coupled with employment stand out as the subject matter of undismissed Counts 1 and 2. This subject is related in context to dismissed Counts 3 to 7, inclusive. The questions in the dismissed Counts 3, 4, 5 and 6 followed undismissed Counts 1 and 2 and were a rephrasing (R 88, 95, 96) to elicit the answers desired but not obtained. The trial court said the questions in the undismissed Counts 1 and 2 were general and not dangerous to the appellant. The court is looking backward and substituting its own interpretation for the appellant's apprehension.

Examination of dismissed Counts 3, 4, 5 and 6 shows dates and jobs specifically. Dismissed Counts 3, 4 and

5 all mention the same year of 1948, the same year mentioned in undismissed Count 2; these dates and sequence certainly involve employment "since 1935," the date in undismissed Count 1. Similarly in dismissed Count 6 the question includes the phrase "were you at any time . . .". In fact, the record (R 157, 171) shows that the court did consider dismissing Counts 1 and 2, did dismiss Count 2, and then reinstated it. If a judge is confused about whether to leave a count in or dismiss it, then it is and was an unreasonable and impossible burden to lay on appellant. TO DECIDE THEY WERE NOT DANGEROUS QUESTIONS.

At this point appellant Jackins wishes to stress the possibility of his being exposed to perjury if the testimony in his answers should have been at variance with other testimony concerning THESE activities AND DATES, whether or not communistic (R 86). These things have occurred in recent cases and apprehension of them is not mere imagination.

With respect to the further context of Counts 1 and 2 to Counts 4 and 5, Count 4 asks if the witness was expelled in 1948 from Local 46 of the International Brotherhood of Electrical Workers. The court apparently reasoned that there was sufficient evidence connected with the Local 46 and the International Brotherhood of Electrical Workers in 1948 which did not include employment by the Communist Party to give appellant a basis for reasonable apprehension. Count 5

was also dismissed and it asks if appellant was expelled as Business Agent of the Building Service Employees Union "sometime prior to 1948." Count 6, also dismissed, asked "Were you *at any time* expelled from Lodge 751 of the Areo Mechanics Union?" (Emphasis added). The appellant is at a loss to understand why with reference to Counts 3, 4, 5 and 6, the court accepted the evidence to show that the appellant had a basis for reasonable apprehension although none of it indicates Communist Party employment, and yet refused to dismiss Counts 1 and 2, both of which involved questions the answers to which involved the same times—1948 and before.

Counsel for the Committee also reveals a basis for appellant's apprehension by the following (R 106):

"Mr. Tavenner. I think I should advise the witness that there has been heard in executive testimony before the Committee the witness Elizabeth Boggs Cohen, C-O-H-E-N, and the witness Leonard Basil Wildman, both of whom were heard on May 28, 1954, and both of whom identified you as at one time an active member of the Communist Party, Mr. Wildman having identified you as the organizer of a branch of the Communist Party while you were in attendance at the University of Washington. This is your opportunity, if you desire to take advantage of it, of denying those statements, if there is anything about them which is

untrue."

It is clear here:

(1) That the tie-in of this testimony goes back to a time "since 1935." Defendant's Exhibit A-13 sets forth the transcript of attendance of the appellant at the University of Washington by years. Is this not in and of itself a basis for the reasonable apprehension to be exercised?

(2) That the invitation to "deny those statements" is an invitation to make a positive statement on the basis of which a case of perjury could be charged or grounded; admissions or denials of the appellant to be used against him;

(3) By answering or attempting to answer (as happened on other questions) appellant would be charged with having waived his privilege;

The Court of Appeals for the 5th Circuit in *Marcello v. U. S. (1952)*, 196 F. 2d 437, stated the test to be used by the courts in determining whether an answer to a question could "possibly have a tendency to incriminate." The court said:

> "We come then to an examination of each of the six questions upon refusal to answer which the appellant stands convicted, applying to each the test which we understand to be prescribed by the Supreme Court in *Hoffman v. U. S.*, 341 U. S. 479,

71 S. Ct. 814, 95 L. Ed. 1118; vis.: In the setting in which it is asked and from a careful consideration of all the circumstances in the case, is it perfectly clear to the Court that the witness is mistaken, and that the answer cannot possibly have a tendency to incriminate him? (Citing many other cases.)"

Wigmore (*VIII Wigmore on Evidence*(*3d Ed.*) 354, Sec. 2260) states that "the orthodox and traditional doctrine (is) that the privilege covers facts which even 'tend to incriminate' and quoted from *Paxton v. Douglas* (1809), 16 Ves. Jr. 239, 242, 19 Id. 225, as follows:

> "If a series of questions are put, all meant to establish the same criminality, you can not pick out a particular question and say, if that alone had been put, it might have been answered . . . He is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him except as it is one link in a chain of proof that is to affect him."

Wigmore also quotes from the classic statement of Chief Justice Marshall in Aaron Burr's trial, *Robertsons' Reports* I 208,244:

> "According to their (the prosecution's) statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule

that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his bosom, he is safe; but draw it thence, and he is exposed to a prosecution. The rule which declares that no man may be compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the Court can never know. It would seem, then, that a Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

It was said in *U. S. v. Fitzpatrick* (1951), 96 F. Supp. 491, 494:

"Where a witness, such as the Defendant here, has claimed the protection of the Fifth Amendment, and that in a setting in which he has been denounced by other witnesses testifying, as a communist, where testimony by other witnesses, if believed, shows that he has been active in organizing and directing a communist organization, where the statutes then in force make it a criminal offense to do such things and where prosecutions have been instituted against those who are charged with doing them, it seems to me to be clear that the Committee was put on ample notice that the Defendant apprehended that the answer to the question involved in this indictment would furnish information which could be used in the

prosecution of him in a criminal case under existing Federal statutes, and for that reason . . . declined to answer the questions. *P. Blau v. U. S.,* 340 U. S. 159.

"As the defendant cannot be found guilty of contempt in refusing to answer the question here involved . . . the judgment of the Court is that he is not guilty."

In *Patricia Blau v. U. S.,* 340 U. S. 159, the Supreme Court in a unanimous opinion acquitting stated:

"At the time the petitioner was called before the grand jury, the Smith Act was on the statute books making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; to be or become a member of such a group with knowledge of its purposes. These provisions make future prosecution of the petitioner, far more than 'a mere imaginary possibility' . . . *Mason v. U. S.,* 244 U. S. 362, 366: she reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings. Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a citizen the privilege of remaining silent. The attempts by the Courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the begin-

ning. (Citing cases.)"

See also *Estes v. Potter,* 183 F. 2d 865, and *Alexander v. U. S.,* 181 F. 2d 480.

In *Hoffman vs. U. S.*, 341 U. S. 479, 486, the Court said:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a Federal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a Federal crime . . . But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer . . . It is for the Court to say whether his silence is justified . . . However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required ot be established in Court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence' . . ."

The *Notre Dame Lawyer, supra,* at page 232, suggests:

> " . . . some scope for refinement may, however, exist in the case of a witness who refuses not only to answer the question but to answer a further question, whether or not a truthful answer to the

> second question would incriminate him, or who claims the privilege simply because he foresees that if he does not, and puts his own sworn denial in opposition to the statement of the Committee informants, he will inevitably provoke a perjury prosecution. . . . the recent holding of the Third Circuit Court that no further 'background' incriminating possibilities need be shown by the witness other than such possibilities of incrimination as can be conjured up by 'ingenious' legal argument, citing *U. S. v. Coffey,* 198 F. 2d 438."

Liberal construction should be given the privileges conferred by the Bill of Rights in favor of a person claiming them. *Hoffman v. U. S.,* 341 U. S. 479, 486 (1951); *Counselman v. Hitchcock,* 142 U. S. 547, 562 (1892).

It is therefore clearly established that even though an answer would not support a conviction yet if it would form a link in a chain of evidence, the privilege may rightfully be claimed. *Blau (Patricia) v. U. S.,* 159 (1950); *Counselman v. Hitchcock,* 142 U. S. 547 (1892). And in *Hoffman v. U. S., supra,* the Court stated:

> "However, if the witness . . . were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result . . ."

In the recent ruling in *Emspak v. U. S.,* supra, page 592 to 593, the Court quoted with approval from *Hoffman v. United States,* supra, that it need only be evident from the implication of the question and the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result and also:

> "This Court has already made abundantly clear that such questions, when asked in a setting of possible incrimination, may fall within the scope of the privilege."

No authority has been found which would compel appellant to show employment by the Communist Party as required by the trial court (R 174-177).

SPECIFICATION OF ERROR NO. 10

(APPELLANT DID NOT WAIVE HIS PRIVILEGE, OR HIS RIGHT TO REFUSE TO ANSWER COUNTS 8, 9 AND 10)

The questions represented by Counts 8, 9 and 10 presented appellant with two risks: According to the Committee appellant waived his privilege (R 111); and there was a risk as to pertinency.

The questions were not pertinent in the sense that they could result in fruitful legislation or furnish legislative information of any value. At this point appellant incorporates his argument under Specification of

Error No. 12 discussing pertinency in this brief, page 61-69. At the trial counsel for appellant tried to pin down counsel for the Committee who was testifying on the purpose behind these questions and their pertinency. The witness kept retiring behind the need for more identification and the broad purpose of the Committee. (R 30, 34). The questions called for more and never ending identification, if identification were the purpose.

It is noted that the questions in Counts 8, 9 and 10, grew out of an answer by appellant concerning his employment and clearly not pertinent on its face (R 108). Thereupon the Committee, by its very next question (R 108), injected communism. Appellant was faced with the prospect of discussing his non-pertinent business, giving the names of his non-pertinent business associates, damaging them through publicity in that setting, denying communist connections. Would these answers have been considered not waiver? *Griswold,* supra, page (22-27, 59-60), discusses the plight of a witness faced by a question to answer concerning communism, and waiver resulting therefrom. It is submitted appellant did not waive his privilege or his right to refuse to answer by having answered on a matter (his employment) that was at the time not an incriminating matter. Appellant would have been faced with contempt for not giving this general "identifica-

tion" answer early in the hearing.

That the tactic of "more identification" was foreseen as artificial appears from the opinion of Judge Prettyman in *Barsky v. United States,* 167 F. 2d 241, 246 (D. C. Cir. 1948):

> ". . . In short, an unlimited right of 'identification' under the guise of investigation leads logically to a right of inquisition which is foreign and hateful to our traditions. Cf. *Board of Education v. Barnette,* 319 U. S. 624, 642 (1943): 'If there is any fixed star in our constitutional constellation it is that no official can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by words or act their faith therein'."

In *McCarthy v. Arndstein* (1922), 262 U. S. 355, the Court held that a witness has the privilege of stopping short at any place in his testimony whenever an answer may fairly tend to incriminate him. The Court stated (at page 359):

> ". . . if he has not actually admitted incriminating facts, he 'may unquestionably stop short at any point and determine that he will go no further in that direction,' . . . and it makes no difference in the right of a citizen to protection from incriminating himself that he has already answered in part, he being 'entitled to claim the privilege at any stage of the inquiry'."

In *Smith v. U. S.,* 337 U. S. 137, 150, the Court said:

> "Although the privilege against self-incrimination must be claimed, when claimed it is guaran-

teed by the Constitution . . . Waiver of constitutional rights . . . is not lightly to be inferred."

In *Rogers v. U. S.,* 340 U. S. 367, the Court held there had been a waiver because the witness, having freely answered self-incriminating questions relating to her connection with the Communist Party, could not refuse to answer other questions which did not subject her to a real danger of further incrimination.

In the case at bar, there was no waiver by the appellant of his right to claim the privilege. It is true that members of the Committee, attempting to confuse and trap him, told the appellant he had waived his privilege, but the fact is that there was no waiver.

In *Emspak v. U. S.,* supra, the court, citing from *Smith v. U. S.,* supra, reaffirms that a waiver of constitutional rights is not lightly to be inferred and, at page 591, states:

> ". . . And even if petitioner's 'no' answer were taken as responsive to the question, the answer would still be consistent with a claim of the privilege. The protection of the Self-Incriminating Clause is not limited to admissions that 'would subject (a witness) to criminal prosecution'; for this Court has repeatedly held that 'Whether such admissions by themselves would support a conviction under a criminal statute is immaterial' (quoting from *Patricia Blau v. United States,* 340 U. S. 159, 161, 95 L. Ed. 170, 172, 71 S. Ct. 223) and that the privilege also extends to admissions that may only tend to incriminate. (Citing *Hoffman v. United States* (U.S.) supra, Note 14,

341 U. S. at 486, 487; *United States v. Burr* (CC Va.) F. Cas. No. 14692e. And see Note 18, infra.). In any event, we cannot say that the colloquy between the committee and petitioner was sufficiently unambiguous to warrant finding a waiver here. To conclude otherwise would be to violate this Court's own oft-repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' (Quoting from *Johnson v. Zerbst,* 304 U. S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357. See also, e.g., *Glasser v. United States,* 315 U. S. 60, 70, 86 L. Ed. 680, 699, 62 S. Ct. 457, and *Smith v. United States,* 337 U. S. 137, 150, 93 L. Ed. 1264, 1273, 69 S. Ct. 1000.)

SPECIFICATION OF ERROR NO. 11

(THE COURT SUBSTITUTED FOR REASONABLE APPREHENSION AS TO COUNTS 1 AND 2, TOO GREAT A BURDEN ON APPELLANT TO KNOW ABSOLUTELY THAT THE COMMITTEE ONLY WANTED GENERAL INFORMATION.)

We incorporate as part of the argument herein the argument of appellant under Specification of Error No. 10 concerning waiver. Considering that claims of waiver by the Committee were invoked at every opportunity, it is clear that had the appellant answered Counts 1 and 2 the Committee, (and the trial court for that matter), would have claimed waiver again.

Appellant produced ample evidence of reasonable apprehension with respect to these Counts all set forth and discussed in the argument under Specifications

of Error 5, 6, 7, 8 and 9 and adopted as part of the argument under this Specification of Error.

It is clear that the answers to Counts 1 and 2 would have set forth dates and jobs going back to "since 1935", the period mentioned in Count 1, and "How were you employed in 1948?" which is the question in Count 2. These years as demonstrated by the evidence included alleged organizational work for the Communist Party at the University of Washington going back to "since 1935", and other alleged communist activities. The different jobs and employment in 1948 included those spelled out in dismissed Counts 3, 4 and 5. It cannot be doubted that the information which was sought by the Counts 1 and 2 gave a basis for reasonable apprehension. If appellant answered by denial, or gave answers inconsistent in details as much as 19 years old, and which was at variance with testimony of other witnesses before the committee as set forth in defendant's exhibits, would not the defendant have exposed himself to a perjury charge? (R 86)

Under the exposure tactics of the committee it has been suggested that this is exactly what the committee wants. Many of these investigations have led not so much to legislation as to prosecution for perjury.

Appellant's grounds for reasonable apprehension clearly show a relation in context as to time and subject matter between dismissed Counts 3, 4, 5 and 6

with undismissed Counts 1 and 2.

Other evidence has been amply covered elsewhere in the argument under Errors 5, 6, 7, 8 and 9.

Nor did the committee fairly apprise appellant that it only wanted him to answer generally what he did "since 1935." The court too readily shifted the burden to appellant (R 160). However, the court, after a discussion with counsel for plaintiff (R 156-157) seemed to feel that "If you once start, once start answering in a given subject in a given field, that then it is too late to claim the privilege after that time no matter where that may lead you . . ." and again (R 157) "That has been my impression of the law. Now if that, if that is right, if that position is correct, then I think I have got to dismiss Counts 1, 2 and 3."

But after further argument of counsel for plaintiff that the appellant could have made a general answer to an identification question, the court decided (R 160) that the appellant could have answered until the committee "pinpointed it to the point where it was obviously incriminating."

The Court did seriously consider dismissing Counts 1 and 2 (R 157, 171) but counsel for plaintiff (R 158) suggests a possible appeal dilemma. Counsel for appellant (R 159) argued to the court that "I think your Honor, the first reaction you had when you thought 1,

2 and 3 should be dismissed was based on that understanding, and I respectfully suggest that trying to read an interpretation of an employment record into the mind of a witness six, seven, eight months ago and say he should have told what he was, I think that is just a little bit rough. He had a reasonable thought and a reasonable apprehension."

We submit that it was too heavy a burden on appellant, and flies in the face of appearances to "know" that the committee only wanted a general, "safe, non-incriminating answer".

SPECIFICATION OF ERROR NO. 12 AND 13

(COUNTS 8, 9 AND 10 WERE NOT PERTINENT; ASKED TO FORCE WITNESS INTO WAIVER.)

Appellant urged non-pertinency by Motion to Dismiss (R 6) and by argument during the course of the trial. The motion was passed for argument during trial on the general issue (R 7), and was considered by the trial court at the time of general argument (R 120-127; 140-143). The court ruled: "I think almost every one of the questions on its face and particularly when taken in context with the questions preceding and following indicate almost without any further proof that they are pertinent . . ." (R 135).

On their face Counts 8, 9 and 10 are not pertinent. Furthermore, and contrary to the trial court's ruling,

the evidence in the record in context taken from the answer of the appellant on his occupation (R 108) conclusively shows that these counts were not pertinent. And the court also held that appellant had to answer these questions on another ground, namely, because he had waived his right not to further answer by having earlier told what his occupation was (R 167). (Discussed by appellant under Error No. 10, Page 54 of this brief.)

Title 2 U. S. C., Section 192, requires as a matter of law that the questions "be pertinent to the question under inquiry."

The Congressional Resolution does not authorize inquiry into the matters covered by the questions in Counts 8, 9 and 10. Plaintiff's Exhibit 2 (R22-23) is House Resolution No. 5 (R 19), of the 83d Congress and plaintiff explained (R 19) that the hearings were pursuant thereto and to Law 601, Section 121, 79th Congress, 2d Session. Said Law 601 as it pertains to the Committee reads as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propoganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other

questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any such subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member." (Cited from page 793, Chapter 753, under Public Law 601 of the United States Code Congressional Service, 79th Congress, 2d Session, 1946.)

Only by the remotest stretch of imagination, and by granting an unjustifiable latitude to a presumption of legislative inquiry can it be said that the questions represented by Counts 8, 9 and 10 are authorized by the resolution. The plaintiff has not sustained any of the burden of proof to show the pertinency of said questions. As suggested elsewhere in this brief (page 69) if there ever was a presumption of pertinency on the first inquiry as to the Appellant's work at the

time he appeared before the committee it was dispelled by appellant's forthright answer (R 87, 108). Thus non-pertinency being established by the answer of the appellant (and if he had not answered he would have faced the threat of contempt charges at that point) it became the burden of the plaintiff to establish as a matter of law, and as a requisite under a criminal statute (Title 2, Section 192) to prove pertinency beyond a reasonable doubt. This plaintiff has totally and completely failed to do.

Nothing in the resolution allowed the committee a general power of making inquiry into the private affairs of the appellant and his associates without a further showing.

The law and classic statement attributed to *Kilbourn v. Thompson*, 103 U. S.-168, is:

> "Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."

The crime defined in the statute is a refusal "to answer any question pertinent to the question under inquiry." Appellant answered fully and freely regarding his occupation at the time he appeared before the

Committee. As far as he was concerned there was nothing incriminating. If he had refused to answer that question would a later court have held that the innocence of his answer had nothing to do with the pertinency? It has been so held in *U. S. v. Ormon,* 207 F. 20 148, 154. But with appellant once having answered showing the non-pertinency of the subject matter was not the right of the plaintiff terminated? Did not non-pertinency then become clear? Was not the matter then a private affair of the appellant? Is there no stopping point to how far an inquiry can go under the stated purpose of examining communism? Will there ever be a case of non-pertinency for an alleged ex-communist? If the matter is non-pertinent must he then answer as to all his associates in the business bringing them and their business into the opprobrium of appellant's public hearing? The record (R 121, 140) indicates that appellant argued to the court below this matter of non-pertinency but the court held that there had been a waiver and that it was not necessary to have incriminating matter before there could be a waiver (R 141). Further the court held that by an identification answer early in the hearing (R 87) the defendant by having told what his job was had waived his right not to answer further. Under this holding you are damned if you do and damned if you don't. In *Sinclair v. U. S.,* 279 U. S. 263 (1929) the court held that the government had sustained its burden to show perti-

nency before the lower court which had decided the question as a question of law, and the court further stated "the matter for determination in this case was whether the facts called for by the questions were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry'." In the instant case before the court can it be said as a matter of law that the questions represented by Counts 8, 9 and 10 could reasonably be said to be "pertinent to the question under inquiry."? It is submitted that they are not only not pertinent but they are ridiculously insignificant and more so because the address and name of the business were already in the files of the Committee and appeared in its Congressional Summons and citation (R 49) (Plaintiff's Exhibit 7).

"Pertinency" as a statutory requirement for the contempt conviction has not been proved beyond a reasonable doubt as to the questions reflected by Counts 8, 9 and 10. It has been held in *Bowers v. U. S.*, 202 F. 2d 447 (D. C. Circ. 1953), that the defendant should have been acquitted in the United States District Court for refusing to answer a question propounded by a Senate Committee investigating organized crime in interstate commerce where the government had not sustained the burden of proving the pertinency of the questions the witness had declined to answer:

The Circuit Court stated:

> "Our view is that, on its face, the question was not pertinent to that inquiry . . .
>
> "While it was the duty of the trial court to determine as a matter of law whether the question was pertinent, that determination could only be made from a factual showing by the government, since the question and the answer for which it called, standing alone, did not pertain to the subject under inquiry. We find in the record not the slightest showing by the prosecution that the nature of Bowers' business in Chicago in 1927 pertained to, or would shed any light upon, the activities of organized crime in 1951."

It is submitted that the reasoning of the Circuit Court in the Bowers case is applicable to Counts 8, 9 and 10. There is nothing in the record to relate 8, 9 and 10 to the subject under inquiry. In fact, the only thing in the record, to wit, is the answer of the appellant describing the nature of his occupation and this distinctly shows no pertinency.

It is necessary as a matter of law for the plaintiff to plead and show that the questions pertained to some matter under investigation. Certainly the business of the defendant in 1955 was not under investigation. There is no evidence in the record relating appellant's work to communist activities.

It was suggested that, when Bowers, supra, was being examined before the subcommittee, he did not assign lack of pertinency as his reason for refusing the answer questions, and so waived that defect. It was

held that the right to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-incrimination, which is waived if not seasonably asserted; but that pertinency is an element of the criminal offense which must be shown by the prosecution. *Christoffel v. U. S.,* 1949, 338 U. S. 84, involved a prosecution for perjury before a Congressional Committee under a perjury statute which required that a "competent tribunal be present when the false statement is made." The Supreme Court stated, 338 U. S., at page 89:

> "We are measuring a conviction of crime by the statute which defined it. . . . An essential part of a procedure which can be said fairly to inflict . . . punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt. An element of the crime charged in the instant indictment is the presence of a competent tribunal . . ."

Christoffel's conviction was reversed because the government had not proved the presence of a majority of the Committee at the time of the alleged perjurious testimony. Christoffel did not raise before the Committee the point of no quorum. See also *U. S. v. Bryan,* 1950, 339 U. S. 323, *Bowers v. U. S.* ,supra.

It is interesting to note that in the Bowers case the court also stated that the presumption of innocence stayed with Bowers throughout the trial. The court rejected the thought that the questions were prelimi-

nary in nature and had they been answered would have led to and been followed by questions plainly pertinent for on that theory pertinency need never be shown in a prosecution under the statute. It could always be said the questions were preliminary. The indictment charged the seven questions were themselves pertinent; and the allegation was not sustained by a more possibility that they might have led to later relevant questions.

In the concurring opinion in the Bowers case, supra, by Circuit Judge Bazelon, he stated that the decision makes clear that no presumption of intent to violate the statute attaches to a naked refusal to answer, without a statement of the reason therefor, to "a question not shown to be 'pertinent to the question under inquiry'."

If there was a presumption of the validity of the questions regarding any work of appellant as an alleged ex-communist and his associates as having legislative evaluation then, after the answer as given in the instant case, is not said presumption dispelled and does not the burden of proof thereupon shift to plaintiff to prove that the insignificant answers to the questions represented by Counts 8, 9 and 10 did have legislative evaluation? Again, considering appellant's answer on his work, was not the information thereafter called for by the questions in Counts 8, 9 and 10 an inquiry into

personal and private affairs? Does this not meet the situations ruled upon in *U. S. v. Rumely,* 345 U. S. 41, not only as stated by the majority opinion but as to the additional supporting opinion of Justices Black and Douglas? The case held that the Committee had gone beyond its proper power in trying to compel testimony as to the identification of Rumely's contributors and that Congress intended that the Committee was to investigate only into direct lobbying. Mr. Jusice Black and Mr. Justice Douglas held in addition that the inquiry should be invalid on the constitutional ground that "Inquiry into personal and private affairs is precluded . . . And so is any matter in the strict sense of which no valid legislation could be had."

The questions represented by Counts 8, 9 and 10 were not of legislative importance. In *Sinclair v. U. S.* (1929), 279 U. S. 263, 292, the court was considering an indictment under 2 U. S. C. A. 192 for refusal to answer the question of a Congressional Committee. The court reviewed several cases and then stated:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect to their personal and private affairs. In order to illustrate the purpose of the Courts well to uphold the right of privacy, we quote from some of their decisions.

"In *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377, this Court, speaking through Mr. Justice Miller, said (page 190):

"We are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which that house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possess the general power of making inquiry into the private affairs of the citizen.' And referring to the failure of the authorizing resolution thereunder consideration to state the purpose of the inquiry (page 195): 'Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority more than any other equal number of men interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred.'

"In Re *Pacific Railway Commission* (Circuit Court, N. C. Cal.) 32 F. 241, Mr. Justice Field, announcing the opinion of the courts, said (page 250): 'Of all the rights of citizens, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value.' And the learned Justice, referring to *Kilbourn v. Thompson,* supra, said (page 253): 'This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a Congressional Committee' . . .

"In *Interstate Commerce Commission v. Brimson,* 154 U. S. 447,. page 478, 14 S. Ct. 1125, 1134 (38 L. ed. 1047), Mr. Justice Harlan, speaking for

> the Court, said: 'We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses or can be invested with, a general power of making inquiry into the private affairs of the citizen. . . . We said in *Boyd v. United States*, 116 U.S. 616, 630 (6 S. Ct. 524, 29 L. ed. 746)—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of his life."

The constitutional restraints, contained largely in the Bill of Rights for the protection of the citizen are spelled out, while the right of Congress to carry on investigations for legislative purposes is not spelled out but is merely implied. To what extent does the implication become stronger than the actual article of the Constitution?

Appellant is appealing from a nominal sentence at considerable expense in order to protect his name and in order not to have a record of criminal conviction.

The entire Congress has not seen fit to intelligently study and debate motions for contempt. Plaintiff's Exhibit 7 shows no general Congressional discussion as to how appellant as a citizen was handled. If the Congress won't examine the hearing the Court must.

If, as was early held in *Marbury v. Madison, 1 Cranch*

137, at 163, by Chief Justice Marshall, the Supreme Court has the power to declare an act by Congress invalid if it were in fact unconstitutional, it would seem that the methods and actions of committees of Congress could be declared invalid.

In the famous case of *U. S. v. Burr,* (C. C. Va. F Cas No. 14692E), Chief Justice Marshall upheld the privilege even though President Jefferson and his executive branch of government were extremely anxious to convict Mr. Burr.

In the Federalist, No. 78, Hamilton has stated the principle of judicial supremacy which Marshall wholeheartedly adopted in *Marbury v. Madison,* supra:

> "The interpretation of the laws is the proper and superior province of the Courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to state its meanings, *as well as the meaning of any particular act proceeding from the legislative body.* If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute, the attention of the people to the intention of their agents." (Emphasis added)

In the *Federalist,* No. XLVII (1778) it is stated:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."

And in *Meyers v. U. S.*, 272 U. S. 52 (1926), it is stated:

> "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote deficiency but to preclude the exercise from arbitrary power."

And Alexander Hamilton is quoted as saying:

> "There is no liberty, if the power of judging be not separated from the legislative and executive power."

And Hamilton, again, in the Federalist, No. LXXVIII (1778) states that the Constitution's retraints on the legislature: "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." He also said that the courts were designed to be "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits designed for their authority."

It is a concentration of power in the legislature when the judiciary rationalizes legislative pertinency and allows exercise of arbitrary power as in the instant case. And is it not voiding the constitutional duty of the court merely to say that the methods of the Committees constitute a question for the legislature to determine itself? Is it not the constitutional duty of the courts to check on the unfair practices of the legisla-

ture as well as to declare unconstitutional acts invalid?

Considering appellant's answer on his work, it is patently clear that the remaining questions on the subject were non-pertinent; that since appellant had not answered on incriminating matter he had not committed a waiver; that there can be no waiver on a non-pertinent matter.

The court below was too liberal in its presumption of pertinency as against protecting the appellant as a citizen, and granting him a higher presumption of innocence .

In *United States v. J. H. Rosenbaum,* Criminal No. 1722-51 (D. D C., November, 1953) the motives of the legislative committee were contended by the witness to have been harassment and that the questions asked were not asked in good faith to get information. The defendant was accused of perjury. The court acquitted him. It has been suggested by the *Notre Dame Lawyer,* supra, page 237, "that an arbitrary presumption of good faith could become a sanctimonious fraud, sanctioning unlimited prying into privileged personal matters."

CONCLUDING ARGUMENT

1. AS TO COUNTS 8, 9 and 10. Appellant earnestly suggests that the record conclusively shows that the committee when it asked these questions, at the end

of the hearing, was well aware of the claim of privilege consistently maintained by appellant and that their wild questioning of appellant as to espionage, et cetera, was part of a now well-recognized policy to use the committee for "exposure" purposes and as in this case to harass and harm a witness. Therefore, the committee had abandoned its legislative function and was surely attempting to harm or destroy a citizen with the assistance of television and radio publicity.

Dicta in the following outstanding case would not be dicta in appellant's case:

> "It may be that a Congressional Committee does not even have to have a legislative purpose but may conduct hearings solely to inform the public. So far as I am aware, no court has ever held that a Congressional Committee may compel the attendance of witnesses without having a legislative purpose. But that question I need not and do not decide in these cases."

U. S. v. Kleinman, dicta., 107 F. Supp. 407, 408 (D. D. C. 1953)

Where exposure becomes involved what happens to the guiding principles for appellant and later for a court which conducts the trial of appellant? Here, where it is clear that the committee had collectively embarked upon "exposure", and where from the nature of the questions in Counts 8, 9 and 10, the answers sought would be unimportant and could have no bearing on fruitful legislation, may not this court conclude that

the Committee in the instant case had abandoned its legislative function and thus lost the benefit of any presumption which the trial court seemed too willing to grant?

> ". . . we would have to be that 'blind' Court against which Mr. Chief Justice Taft admonished in a famous passage, Child Labor Tax Case, 259 U. S. 20, 37, that does not see what ('a')ll others can see and understand' not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the Congressional power of investigation." Mr Justice Frankfurter in

U. S. v. Rumely, supra, 345 U. S. 41, 44 (1953).

~~Mr. Justice Frankfurter in~~ *Wigmore,* supra, (discussing privilege) page 308, Vol. 8, 3rd Ed., states that:

> "The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby . . . The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachment of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized."

The courts should take cognizance of the odium attached to appellant's hearing.

2. Although there is repetition appellant is suggesting to the court that judicial unwillingness to give effect to the doctrine of separation of power has resulted, particularly in appellant's case, in enforcement and detective work of the executive branch of government being performed by the legislative committee.

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

Quinn v. U. S., supra, page 571

If the legislature is to be stopped where it violates constitutional provisions, the individual citizen must depend on the courts.

During the Army-McCarthy hearings in 1954 the President of the United States refused to permit a witness to testify concerning a meeting of various officials of the executive branch of the Government.

It is common knowledge also that when ex-President Truman was subpoenaed by the same committee

which examined appellant he refused to respond.

In June of 1953 Federal Judge Louis E. Goodman refused to submit to questions of the House Judiciary Subcommittee. This incident is reported in an article written by *Abe Fortas* in the *August 1953* issue of the *Atlantic,* entitled *"Outside the Law", page 42.*

Just how far can the courts allow the legislature to run in assault on rights of an individual citizen?

Mr. Justice Jackson in *Eisler v. United States,* 338 U. S. 189, 196 (1949) states: "I should not want to be understood as approving the use the Committee on Un-American Activities has frequently made of its powers but I think it would be an unwarranted act of judicial usurpation to strip Congress of its investigatory powers or to assume for the courts the function of supervising Congressional Committees. I should . . . leave the responsibility for the behavior of its Committee squarely on the shoulders of Congress."

Need this mean that the courts will be subservient to the legislative branch of the government in encroachment upon individual constitutional rights whenever met with the formulae of "national welfare", "national security", "communism", or "legislative investigations"? When appellant is publicly abused and where appellant is pounded with questions calling for refined thinking on matters which later on even confused the

trial judge, surely here is a situation calling for judicial enforcement of constitutional restraints in favor of a "mere" citizen. The court does not have to "strip Congress of its investigatory powers", or supervise Congressional Committees. Its duty under the Constitution is to enforce constitutional restraints against despotic and unfair methods used by other branches of the government. The presumption of legislative function and pertinency—not spelled out in the Constitution as to broad powers – should be held inferior to Constitutional restraints spelled out in the Fifth Amendment.

For the reasons set forth above, we respectfully petition that the judgment of the Court below be reversed.

Arthur G. Barnes
Attorney for Appel

APPENDIX "A"

Being excerpts from hearings before the Committee on Un-American Activities House of Representatives, Investigation of Communist Activities in the Pacific Northwest Area and in Evidence as Exhibits of the Defendant. A-1, A-2 and A-3.

Def's. Exhibit A-1—Pamphlet, Part 1—Elizabeth Boggs Cohen
Page 6003:

Mr. Wheeler: Do you recall the membership of the Communist Party in Seattle at that time?

Mrs. Cohen: When I became chairman, approximately 200; and during the two years I think it grew to about 1,200.

Mr. Wheeler: What 2 years was this?

Mrs. Cohen: At a guess, from 1936 to 1938.

Page 6004:

Mr. Wheeler: Are these the people you identify as functionaries within the party during that time?

Mrs. Cohen: Full-time functionaries.

Mr. Wheeler: During this period of time did you meet other individuals whom you can identify as members of the Communist Party?

Mrs. Cohen: . . . Other trade unionists were Merwin Cole from the Building Service Employees Union, . . . Jess Fletcher, Building Service Employees Union.

. . . Others that I met as Communists were . . . Harvey Jackins, youth leader; . . .

Def's. Exhibit A-1—Pamphlet, Part 1—Leonard Basil Wildman
Page 6027:

Mr. Wheeler: Will you explain your activities and official position with the YCL in Seattle from 1939 to 1941?

Mr. Wildman: . . .

Mr. Wheeler: Well, now, who were the other leading people in the YCL?

Mr. Wildman: . . . There was a young fellow by the name of Harvey--not Jackson.

Mr. Wheeler: J-a-c-k-i-n-s?

Mr. Wildman: Jackins, I think it was; J-a-u-l-k-i-n-s, or something like that.

Mr. Wheeler: J-a-c-k-i-n-s is the correct spelling.

. . .

Mr. Doyle: This was between 1939 and 1941.

. . .

Mr. Wheeler: Who was the organizer for the university branch? . . .

Mr. Wildman: Harvey Jackins was . . .

Page 6028:

Mr. Wheeler: . . .Who were the other members of the Northwest executive committee of the YCL?

Mr. Wildman: . . . Harvey Jackins.

Def's. Exhibit A-2—Pamphlet, Part 2—Barbara Hartle

Page 6067:

Mr. Kunzig: Mrs. Hartle, did you have occasion in your youth work to know a Carl Harvey Jackins?

Mrs. Hartle: I knew of Harvey Jackins as being involved in Communist youth work some years ago.

Mr. Kunzig: Mr. Chairman, this is Carl Harvey Jackins, of 6753 32d Avenue N.W., Seattle. We have already had two other identifications in executive session of this Mr. Jackins as a member of the Communist Party.

Page 6094:

Mrs. Hartle: . . . The Building Service Employees Union, Local 6, was for a long period completely Communist-dominated. High offices have been held in this union by . . . Jess Fletcher . . .

Mr. Kunzig: Now this union and all of these unions that you are discussing, you are mentioning in connection with the fact that they were affiliated with the Pacific Northwest Labor School; is that correct?

Mrs. Hartle: That is correct.

Def's. Exhibit A-3—Pamphlet, Part 3

Page 6232:

Mrs. Hartle: . . . When Harvey Jackins was expelled, I heard a discussion seriously held as to what his wife would do—go with him to the "enemy" or stay with the party. The Jackins have 3 or 4 children.

APPENDIX "B"

Being excerpts from the hearings as published by the Committee showing "setting" —t elevision , flash cameras, microphones, radio, protests, in evidence as Defendant's Exhibts A-4 and A-5.

EXHIBIT A-4

Page 6236:

Mr. Caughlin: In case I care to confer with Mr. Jackins or Mr. Jackins cares to confer with me, what is the situation as far as these microphones are concerned? Is our confidential conference going to be broadcast over it?

Mr. Tavenner. I think if you conduct your conversation discreetly, it will not be heard on the magnifying system. Otherwise you may move back a little.

I have just been told that if you signal it will be cut off completely, so you will be running no risk whatever.

Mr. Clardy. I think, Mr. Chairman, that it would be well to let the record show that the committee has asked those in charge of the radio and television to cut the volume down if they want to confer.

Mr. Velde. Yes; the record will so show.

EXHIBIT A-4

Page 6249:

Mr. Clardy: Mr. Chairman.

Mr. Velde: Mr. Clardy.

Mr. Clardy: I ask that he be directed to answer that question.

Mr. Velde: Just a minute. The witness has a right to confer with his counsel.

Mr. Clardy: I appreciate that, but he was asked where he was born and I don't think he should be entitled to filibuster, as he is trying to do.

Mr. Velde: Nevertheless, he should be given a reasonable time to confer with counsel.

Mr. Clardy: Counsel wouldn't know that as well as he would.

Mr. Velde: You know the rules, sir.

Page 6295:

Mr. Astley: I do.

I ask that the TV cameras be taken off.

Mr. Velde: According to the rules of the committee, the witness has the right to ask that he not be telecast during his particular hearing, so I now direct the cameras to be turned off the witness during the time that he testifies.

Proceed, Mr. Counsel.

Page 6296:

Mr. Astley: May I ask that the photographers go ahead and take their pictures and then leave so that they won't interrupt here? It is sort of nerve racking to have these lights in my eyes.

Page 6301:

Mrs. Kinney: Mr. Congressman, I would like to ask that these still pictures be not taken.

Page 6302:

Mr. Jackson: The Chair does not feel constrained to lay any restrictions on the press as to their activities. If it is the desire of the witness that she not be televised during the course of her

testimony, very well.

Mrs. Kinney: I don't mind being televised but I dislike very much having these still pictures taken, and I think I have a right not to have such photographs taken for anyone to have around them.

Mr. Jackson: The Chair has made the ruling. He will lay no restrictions upon the freedom of the press to operate within this hearing room.

Page 6307:

Mrs. Kinney: Congressman, I shall decline to state whether or not that document was written by me, and I do so.

Would you please have these people (referring to photographers) wait until I finish? It is a little bit disturbing. Besides they always take such ugly pictures, too; and I have seen what they do with pictures in McCarthyite proceedings; I have heard it over the television what they did with the pictures.

Page 6309:

Mrs. Schuddakopf: I do.

I don't want any television. I request not to have television.

Page 6310:

Mr. Jackson: Both television cameras will refrain from photographing the witness during the course of her testimony.

Page 6311:

Mr. Caughlan: May I request on behalf of my client that we also avoid this sort of stuff here. (Referring to photographers.)

Mr. Jackson: Is the request being made by the witness not to be televised?

Mr. Caughlan: No; it is not.

Mr. Jackson: What is the request? If counsel will advise his client, the client may make the request of the Chair.

Mr. Caughlan. Would you please tell the Chair that we would like to have these photographers out of the way, because they are extremely disturbing when you are being examined or anybody is being examined, I have noticed. They flash bulbs—

EXHIBIT A-5

Page 6325:

Mr. Plumb: Pardon me? Would you mind having these gentlemen take their pictures and then—

Mr. Velde: Yes, we will suspend for just a moment so that the still photographers may take their pictures so it doesn't interfere with the testimony.

Page 6336:

Mr. Henrickson: Would you instruct the photographers please to take their pictures and then stop when they have completed their work?

Mr. Jackson: I think they will stop when they have completed their work.

Mr. Henrickson: I would prefer that they would take their pictures not during the time I am testifying. It has a tendency to blind me momentarily.

Page 6367:

Mr. Caughlan: Excuse me, but can we have a little relaxing of this flash bulb situation here? It is very, very confusing. I believe you gentlemen aren't fair.

Mr. Clardy: Mr. Chairman, the counsel knows the rule full well.

Mr. Jackson: I will disregard any request not coming from the witness.

Mr. Moir: I request that, please. They annoy me very much.

Mr. Jackson: I will ask the press, to the extent possible and consistent to proper coverage of this hearing, to accommodate the witness to that extent.

Page 6368:

(At this point Mr. Moir conferred with Mr. Caughlan.)

(At this point Mr. Jackson left the hearing room.)

Mr. Scherer: Mr. Chairman.

Mr. Clardy: Mr. Scherer.

Mr. Scherer: These conversations on the part of counsel are obviously made in a studied contempt of this committee and in a studied attempt to defy the committee.

Mr. Caughlan: I protest this attack on the right of consultation.

Mr. Clardy: Will the counsel please subside? We will tolerate no nonsense from you. You have been filibustering and you will not be permitted to consult again. You know the question. You have been consulting and you are trying to delay the progress of this committee hearing. It will not be tolerated. Answer the question.

Mr. Moir: I am not going to be intimidated—and that man over there interrupted me.

Mr. Clardy: That will be enough. Answer the question one way or the other. It is pretty nearly 5 o'clock.

Mr. Moir: I have been here 4 days.

Mr. Clardy: Will you listen to me and answer the question?

Page 6369:

Mr. Moir: I want to consult with my counsel on this question.

Mr. Clardy: You have consulted too much already. Let us have an answer to that very simple question.

And, Miss Reporter, will you read it again so that there won't be any question about it?

(Question read.)

Mr. Moir: I would like to again—

Mr. Clardy: Just answer the question and make no statement, please, for once.

Mr. Moir: I would like to consult with my counsel on this question before I answer it.

Mr. Clardy: You consulted once and that is enough in the opinion of the Chair.

Mr. Moir: I was interrupted in that consultation.

Mr. Clardy: You consulted once at great length.

Mr. Moir: I would like to consult with counsel. I have got him here to consult with and I don't think you have a right to stop me from consulting with counsel.

Mr. Clardy: It is obvious that you are attempting to be contemptuous. I will give you just 30 seconds to consult with your attorney on a question that you have already consulted with him on in excess of a minute.

(At this point Mr. Moir conferred with Mr. Caughlan.)

Mr. Scherer: Mr. Chairman, it appears to me now that the lawyer is in contempt of the committee.

Mr. Clardy: He has been for a long time. Will you answer the question?

Mr. Caughlan: Sir, just a minute. If remarks are being—

Mr. Clardy: Now, Mr. Attorney, you know better than that. Will you answer the question, Witness?

Mr. Caughlan: Will the committee desist from making remarks about me?

Mr. Clardy: Mr. Counsel, if necessary, we will have you escorted from the room if you do not desist.

APPENDIX "C"

Being Defendants. Exhibits A-6, A-7, A-8, A-9 and A-10

Exhibit A-6—Photostat of P.-I. Article, Friday March 28, 1941—"Boeing Union Man Beaten in Red Fight".

Seattle Post-Intelligencer

FRIDAY, MARCH 28, 1941

BOEING UNION MAN BEATEN IN RED FIGHT

Inte Room Battle Brings Police And Sends Member of Aero Mechanics to the Hospital

By Robert C. Cummings

A union member accused f Communist activity. was eaten into unconsciousness esterday by several brother embers of the Boeing Aeronautical Mechanics' Union folowing an afternoon meeting f the local.

Two other members also were ruck and a third escaped being it only by agile "ducking" as he rift over Communism within the nion flared into violence.

At the night session, five policeen stood outside the meeting ape at the Senator Auditorium, nd there was no further violence, hough at one time tempers neared he boiling point inside the hall.

Most severely beaten was Harvey ackins, whom a special union trial oard had earlier found guilty of ommunist activities. Others struck ere Bob Sinclair and Karl Palm, he latter a suspended trustee of he union.

TWO SUSPENDED

Other developments were:

—Harvey W. Brown, international president of the International Association of Machinists who ecently removed Barney Bader as ocal president for "conduct unbeoming an officer," suspended Bader nd Palm as members. Palm is ader's father-in-law.

—Cullen Bates, chairman of the union's trial committee which reviously had returned "guilty" erdicts against Donald R. Keppler, hen a local vice president, and Hugo A. Lundquist, then business gent, said "the trial board will tay on the job until all the Communists on trial are cleaned out.' t still has fifteen cases to report.

—President Brown told the afternoon meeting that unless the rial committee were permitted to omplete its work the international xecutive council of the I. M. would take over."

—The trial committee recommended that Jackins be found uilty of Communist activity, that he be expelled as a member of the nion and that he be fined $5,000.

—Bader, who was not present at the afternoon session, was scorted out of the night meeting

(Continued on Page 9, Column 3)

Exhibit A-7—Photostat of P.-I. article, Saturday, October 25, 1947—"Auburn School Board Banned Union Agent as Red".

Seattle Post-Intelligencer

Sat., Oct. 25, 1947 5

Auburn School Board—

BANNED UNION AGENT AS RED

By Fred Niendorff

The belief that Local 6 of the Building Service Employes' Union was dominated by Communists played a large part in a decision of the Auburn school board to refuse to deal with the union, it was learned yesterday.

The board, headed by George Peterson, president, flatly declined to negotiate with Harvey Jackins, business agent for Local 6, last spring, when they ascertained he had been active in Communist Party agitation.

Jackins was one of the signers of a Communist Party nominating convention petition July 9, 1946. He is one of several business agents of Local 6 whom the Canwell legislative committee on subversive activities has identified as active in the Communist Party.

MET SHORT SHRIFT

Myron Ernst, business manager and secretary for the Auburn school board, said yesterday that Jackins appeared in behalf of service employes of six schools in the Auburn district but met short shrift when an investigation disclosed his Communist affiliation.

Ernst said the school board is now dealing directly with a grievance committee chosen by the school service employes.

Jess Fletcher, international vice president of the union, asserted in a recent public statement that the executive board of Local 6 has placed active Communist workers on the local's payroll as business agents.

"In most instances," he told the Canwell committee," the business agents devote most or much of their time to Communist Party activities."

He charged that the big Seattle Building Service Employes local has more Communists on its payroll than there are on the direct payroll of the Northwest District of the Communist Party.

Exhibit A-8—Photostat of P.-I. article, Friday, January 16, 1948 —"Electricians Drop Man From Union".

Seattle Post-Intelligencer
32 S Fri., Jan. 16, 1948

Electricians Drop Man From Union

Harvey Jackins, who had previously been expelled from two local unions for Communist leanings yesterday was turned out of Local 46 of the International Brotherhood of Electrical Workers.

"Jackins was expelled by the executive board because it was proved beyond doubt that he is a Communist," Bill Gaunt, secretary of the local, said. "We refuse to tolerate the presence of Reds in our union."

Jackins was ousted as a business agent of Local of the Building Service Employes Union on November 26 by Arthur I. Hare, trustee fo the union, which had been leftist dominated.

He also had been expelled from Lodge 751 of the Aero-Mechanics Union. The board of the American Federation of Labor Electrical Workers gave Jackins three hearings to allow him to prove that the charges against him were false.

He was told that if he signed an affidavit denying that he was a Communist, he would receive special consideration from the union, Gaunt said. He declined.

At the union's regular membership meeting Wednesday night, attended by more than 500 members, no protest was offered when X was announced that Jackins was to be expelled from the union.

Jackins had been prominently identified with leftist activities in this area. At the Lake Washington moorage hearings in July, 1945, he represented the East King County Communist Club in speaking for the proposed moorage.

Exhibit A-10—Photostat of Seattle Times article, November 26, 1947—"5 Ousted from Posts in Union".

THE SEATTLE TIMES
WEDNESDAY, NOVEMBER 26, 1947.

5 OUSTED FROM POSTS IN UNION

Three business representatives and two office workers of Local No. 6, Building Service Employes' Union (A. F. of L.), were fired from their jobs today in the program to rid the union of communistic activities.

Arthur Hare, who was appointed trustee of the local recently after three officers were suspended, said William Ziegner, Harvey Jackins and Al Barnes, business representatives, and Olga Schock and Martha Imsland, office workers, had been dismissed.

The five were not suspended from membership in the union, but merely removed from their jobs, Hare said. Jackins was expelled in 1941 from District Lodge No. 751, Aeronautical Mechanics' Union (independent), in a clean-up of officers and members accused of communistic activities.

No action was taken regarding Thomas C. Rabbitt, former state senator, who was accused of communistic activities during a hearing conducted by William McFetridge, international president of the union.

Rabbitt is on the union rolls as an organizer for the Northwest District Council, Hare said, adding that he had been directed by McFetridge only to handle the affairs of Local No. 6. Rabbitt, however, has been instructed to keep out of the local's offices.

Hare, secretary of San Francisco Local No. 250 of the union, said successors to the three business representatives had not been chosen. He said contract negotiations of the local would go on with the employers as usual.

Exhibit A-9—Photostat of P.-I. article, Saturday, April 5, 1941—"Brown Urges Union to Act on Red Issue"

Seattle Post-Intelligencer
SATURDAY, APRIL 5, 1941

BROWN URGES UNION TO ACT ON RED ISSUE

nternational I. M. A. President Calls on All Members to Attend Mass Meet Tomorrow

Charging that Communists re "challenging the laws and olicies of the Intenational ssociation of Machinists" to ause strife in the Aeronautical Mechanics Union, Harvey . Brown, I. A. M. international president, yesterday rged all of the thousands of Seattle members of the Aeronautical Mechanics to attend mass meeting tomorrow hen reports on trial board nvestigation of Communist harges against various members will be heard.

The meeting will be at 10:30 a. in the Civic Auditorium. Investigations of fifteen union members, whose cases still remain before the trial board, will be reported.

REPORT FINDINGS

The appeal to the membership to ttend the meeting was contained n the following signed statement ssued by Brown last night:

"Communists challenging the laws and policies of the International Association of Machinists is the issue that has caused strife and division within the Aeronautical Mechanics Lodge No. 751.

"The committee investigating charges of Communist activities preferred against certain members will report their findings and recommendations at a meeting to be held at 10:30 a. m. Sunday at the Civic Auditorium.

"Not only members of organized labor but the public generally throughout the Seattle area have their eyes on the International Association of Machinists.

"Aside from membership responsibility every member of Aeronautical Mechanics Lodge No. 751, I. A. of M., is charged with a patriotic duty to cooperate in ridding our union of subversive elements whose teachings are a challenge to our democratic institutons.

"I urge all members of Lodge No. 751 to attend the meeting in the Civic Auditorium and remain until the business is transacted."

EXPULSION URGED

The trial board already has recommended that Harvey Jackins, Aeronautical Mechanics member, be expelled from the union and fined. The action was taken after the board investigated charges

(*Continued on Page 2, Column 2*)

APPENDIX "D"

Being Excerpts from Defendant's Exhibit A-11, page numbers of original report as shown on left.

Un-American Activities Washington State

1948

Report of the Joint Legislative Fact-Finding Committee on Un-American Activities

Preface

The first public hearings were held in the 146th Field Artillery Armory, Fourth and Harrison, Seattle, from January 27 to February 5, inclusive.

93

Q. Do you know Harvey Jackins?

A. I know Harvey Jackins very well, yes. He is a member of the Com-

94

munist Party. He is former business agent of Building Service Local 6. I have known him for a period of about eight to ten years. He was a member of the Communist Party and I appeared at the Building Service Local 6 trial and so stated there under oath, and I understand that he has since been removed from several unions, Local 6 and another union, as I understand, because of his Communist activities.

Q. Do you know Merwin Cole?

A. I knew Merwin Cole probably ten or twelve years. He also was of course a member of the Communist Party, and I learned that he has been a member for approximately—at least fifteen years after I became a member of the Communist Party and I so stated in the Local 6 Building Service, A. F. of L. that is, union trial, and as a result he and—he was—he and the president—he was the secretary-treasurer and Ward Coley, were all removed from leadership in that union.

509

MR. WHIPPLE: That's G-a-r-f-i-e-l-d.

"A. —was listed as the instructor for 'Peoples and Cultures,' and the last instructor mentioned on this page is the same Dr. C. H. Fisher, the Educational Director of the Pension Union, who was scheduled to teach 'Social Security in Washington,' and the pamphlet lists this as being, quote, 'A fighting course to provide up-to-date information for those concerned with social security in the State of Washington,' unquote.

On page four of the bulletin, Burt MacLeech is listed to teach 'Effective Speaking and Union Meeting Procedure.' Page five lists the name of Jerry O'Connell as coordinator for the subject 'Labor's Political Role in 1948' and states that this subject, quote, 'Will tackle both ideological and organizational problems which labor must solve,' unquote. Dr. Ralph Gundlach from the University of Washington is scheduled to teach the subject 'Analysis of Employer Propaganda.' The subject of 'Northwest Labor History' was scheduled to be taught by John Daschbach and William J. Pennock, President of the Washington Pension Union. This announcement said this class, quote, 'Would bring together the rich, inspiring story of the militant and progressive struggles of labor in the Northwest,' unquote. On this same page they announce that at the coming spring term of the school, the subject 'Trade Union Organizational Problems' will be taught by Jackins. Incidentally, I understand this is the same Harvey Jackins who was dismissed from Local 6 of the Building Service Employees Union for Communistic activity, and was recently expelled from the Electrical Workers Union for the same reason.

513

munist Party for the years 1946, 1942, and 1936, and I would like to offer these petitions, nominating petitions of the Communist Party, into the record, and dictate into the record the names of those persons whose names are found on the nominating petitions, whose names have been introduced into the testimony of this hearing as being members of the Communist Party.

First, the name of Al Bristol; Harold Brockway; Marian Camozzi—

CHAIRMAN CANWELL: Mr. Whipple, I think that you might as well sit down and be comfortable while you read this material.

MR. WHIPPLE. Thank you, sir.

Babba Jean Decker, formerly Babba Jean Sears; Ralph Hall; Barbara Hartle: a Mrs. Hiller, whose first name is not identified; Henry Huff, the present Northwest Executive Secretary, District Organizer, of the Communist Party; Harvey Jackins; Burt Nelson; Andrew Remes; Lowell Wakefield; and Mrs. William Ziegner, Sr.

I would like to introduce these names into the record, together with the photostatic copies of the official nominating petitions of the Communist Party for those three years mentioned.

567

By May the 4th, a total of thirty-eight men had been expelled from the Boeing union, with twenty-one cases pending. Richard Frankensteen and Wyndham Mortimer left for Los Angeles on May the 2nd. Housecleaning of the union had been completed by May the 18th and the suspension lifted. Two days later, however, a group of C.I.O. organizers, directed by Harvey Jackins from a sound truck, appeared at the entrance of Boeing plant two. A near riot ensued as they were driven from the plant. Jackins announced plans for a return engagement at the plant for the following Tuesday, but upon law-enforcement officers appearing upon the scene and an announcement by the Prosecuting Attorney and Chief of Police Sears that measures would be taken to prevent further disturbances, nothing more was done by the rebel faction.

98

Q. Do you know a man by the name of Harvey Jackins?
A. Yes, sir, very well.
Q. Were you ever solicited to join the Communist Party by him?
A. I was.
Q. Where and when?
A. At the same place. Not at the same time, though.
Q. What year was that, if you remember?
A. Approximately 1939.
Q. What was the occasion?
A. Just met him in the hall and he solicited my membership—asked me t join the Party. At that time I was active in the Aeronautical Mechanics Unio and it seemed that my membership was desirable.

418

Q. And identify each one.
A. Harold Brockway was the Executive Secretary of the Workers Alliance; William K. Dobbins was a board member; Wallace W. Webb was a board member; Jim Haggin, H-a-g-g-i-n of Spokane was the Vice—State Vice President of the Workers Alliance and also a board member; Art Furnish, from Spokane, also, F-u-r-n-i-s-h Furnish, from Spokane, was also a board member; Harvey Jackins, J-a-c-k-i-n-s, was also a board member.

Q. Is that the Harvey Jackins who subsequently was expelled from the Boeing Aeronautical Employees Union?
A. That I can't tell you, because I am not acquainted with that particular case of Boeing Aeronautical—

Q. Is that the Harvey Jackins that until recently was connected with the Building Service Employees Union?
A. It is my understanding that this is the same person.

Q. Now you can testify of your own personal knowledge as a member of the Communist Party, at this time that each of these were Communists at that time, and that you have sat in closed Party meetings with them.
A. I can.

423

Q. Now did you ever sit in any meetings with the King County Central Committee of the Communist Party?
A. I have.
Q. Who composed this committee, Mr. Armstrong?
A. I can't give you a complete roster of the committee, because again time intervenes, this was seven or eight years ago, a good many of the people that met there I knew simply by their first name or a nickname, but I'll read off to you those that I know and can actually identify.
Harold Brockway at that time was the chairman; Al Bristol, B-r-i-s-t-o-l; this Mrs. Reardon that we've mentioned before; John Laurie, L-a-u-r-i-e; Harvey Jackins:

APPENDIX "E"

(Being Smith Act defendants mentioned in Defendant's Exhibits A-1 to Defendant's Exhibit A-5, inclusive, and Canwell Hearing Defendant's Exhibit A-11.)

Convicted Smith Act Defendant Hartle mentioned in Defendant's Exhibit A-1 on pages 6003, 6004, 6018, 6030, 6032; mentioned or testifying on all pages of Defendant's Exhibit A-2; mentioned in Defendant's Exhibit A-3 on pages 6127 to 6233; mentioned in Defendant's Exhibit A-4 on pages 6235, 6268, 6269, 6275, 6284, 6285, 6294, 6299, 6300, 6310, 6313; mentioned in Defendant's Exhibit A-5 on pages 6320, 6325, 6326, 6328, 6331 to 6333, 6343 to 6357, 6367, 6375, 6377.

Convicted Smith Act Defendant Terry Pettus mentioned in Defendant's Exhibit A-1 on pages 5982 and 6004. Mentioned in Defendant's Exhibit A-2 on pages 6074 and 6075. Mentioned in Defendant's Exhibit A-3 on pages 6141, 6177, 6209, 6211, 6214, 6216.

Convicted Smith Act Defendant Paul Bowen mentioned in Defendant's Exhibit A-3 on pages 6141, 6171, 6209, 6217.

Convicted Smith Act Defendant Henry Huff mentioned in Defendant's Exhibit A-1 on pages 5988, 6003, 6004, 6030. Mentioned in Defendant's Exhibit A-2 on pages 6062, 6065, 6069, 6086, 6101, 6109. Mentioned in Defendant's Exhibit A-3 on pages 6130, 6143, 6145 to 6150, 6152, 6158, 6191, 6197, 6203, 6204.

Convicted Smith Act Defendant John Daschbach mentioned in Defendant's Exhibit A-1 on pages 6005, 6030. Mentioned in Defendant's Exhibit A-2 on page 6086. Mentioned in Defendant's Exhibit A-3 on pages 6177, 6216, 6217. Mentioned in Canwell hearings, Defendant's Exhibit A-11, Appendix "D," on page 509.

Acquitted Smith Act Defendant Karly Larsen mentioned in Defendant's Exhibit A-1 on page 5986 and 5987. Mentioned in Defendant's Exhibit A-2 on pages 6099, and 6107 to 6109. Mentioned in Defendant's Exhibit A-3 on pages 6186, 6190, 6191 and 6216.

APPENDIX "F"

Being excerpts from an article by William T. Gossett, Vice-President and General Counsel of the Ford Motor Co., in 38 A.B.A.J 817 entitled: "Are We Neglecting Constitutional Liberty? A Call to Leadership."

"There is considerable doubt, I think, as to the legitimacy of the purpose of influencing public opinion (818).

• • • •

"Congressional investigations which are launched for the purpose of inquiring into questions of personal conduct, closely resemble the inquisitorial functions of our grand juries. As all lawyers know, in any investigations or grand jury proceeding, it is inevitable that many fruitless lines of inquiry will be undertaken. And so some false leads must be pursued. The inviolate rule of secrecy in a grand jury proceeding is predicated upon the urgent necessity of protecting the good name of the many innocent persons who must be questioned and who, through no fault of their own, might be under suspicion before a determination is made as to which, if any, of those under investigation will be subjected to indictment or other action.

"But no such protection is accorded to those who are so unfortunate as to be required to testify before many of our Congressional committees. Not only are witnesses interrogated in public, but they are denied basic constitutional safeguards which in a court proceeding are granted as a matter of right, even to one who, after investigation, has been accused of a crime. The constitutional safeguards to which I refer, of course, are the rights of the accused to be informed in advance of the nature of the charges against him; his right to be confronted with the witnesses who testify against him, and to subject them to cross-examination; his right to compulsory process for obtaining witnesses in his favor; his right to be represented by counsel; and his right to testify then and there in his own defense.

"Congressional investigations which delve into matters of personal conduct assume the aspects of a trial and thus abridge the rights of individuals, guaranteed by the Constitution. And there have been cases in which, as a result of the publicity of committee hearings, witnesses have been exposed to such penalties as dismissal from their jobs, loss of pension payments, character assassination and injury to their reputations.

"Those who would defend such practices are quick to point out that a witness before a Congressional committee is not in jeopardy—that is, he is not subject to a jail sentence by the

committee in connection with the matter about which he is being interrogated. But the argument ignores the fact that the committee has the power to sully a man's reputation unmercifully, and to many men a good name is fully as important as merely being out of jail. Moreover, a committee can send a witness to jail for refusal to answer a question--even one which a Court might not require him to answer.

"The practices of investigating committees thus are without proper standards. Persons are now subpoenaed before such committees and afforded no right to counsel. Although they often are subjected to the most searching cross-examination themselves, they are denied the right to cross-examine those who testify against them. If they are so-called hostile witnesses, they often are not even accorded the right to make a statement—prepared or otherwise; and if the behavior of the witness is such as not to please the committee or some of its members, he can be summarily punished.

"Some committee members seemingly have viewed the committee as a final court of justice sitting in judgment on the conduct of individuals appearing before the committee. Thus they usurp the judicial function. On the other hand, committee members can and do slander witnesses with impunity, secure in the knowledge that there can be no retaliation in court.

• • • •

"In such an inquiry there is no assumption that the individual is innocent until proved guilty. There are none of the safeguards of a trial to which, by the Constitution and the law, each man is entitled. Instead, there is a type of trial by public opinion, a pillorying of individuals not accused of crimes—of individuals only suspected of being engaged in or knowing something about some improper activity. And the rules are the same whether the witness is innocent or guilty.

". . . It must be apparent that if such tactics are permissible with respect to suspected criminals, they may also be permissible with respect to persons who hold views in conflict with those of the overwhelming majority. Thus, we run the risk that we might all become guilty of imposing 'tyranny of the prevailing opinion and feeling' which John Stuart Mill believed so serious a danger to democracy." (819-20)

No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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INDEX

Page

JURISDICTION 1

PRELIMINARY STATEMENT 2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 3

COUNTER-STATEMENT OF THE CASE 3

ARGUMENT 5

Point I. Privilege Under the Fifth Amendment of the Constitution of the United States 5

Point II. Failure of the Committee to Direct Appellant to Answer Questions after he had Refused 12

Point III. Pertinency of Questions 13

CONCLUSION 16

APPENDIX "A" 18

TABLE OF CASES

Barsky v. United States, 167 F. 2d 241, 250 (CA DC) .. 5, 6, 16

Bart v. United States, 349 U.S. 219 12

Bowers v. United States, 202 F. 2d 447 (CA DC) 13, 15

Eisler v. United States, 170 F. 2d 273, 279 (CA DC) 6

Emspak v. United States, 349 U.S. 190 12

Hoffman v. United States, 341 U.S. 479, 486 ..... 9, 11

Marcello v. United States, 196 F. 2d 437 (CA 5) 11

Morford v. United States, 176 F. 2d 54 (CA DC) 5

Quinn v. United States, 349 U.S. 155 12

Sinclair v. United States, 279 U.S. 263 13

Page

Townsend v. United States, 95 F. 2d 352 (CA DC) 13

United States v. Dennis, 72 F. Supp. 417 16

United States v. Josephson, 165 F. 2d 82 (CA 2) 16

United States v. Kleinman, 107 F. Supp. 407 (DC DC) 6

United States v. Moran, 194 F. 2d 623 (CA 2) 6

United States v. Orman, 207 F. 2d 148 (CA 3) 5, 6, 10, 13, 16

STATUTES

Title 2, U.S.C. (1948 Ed.) Section 192 3

MISCELLANEOUS

Fifth Amendment, Constitution of the United States 3, 5

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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The appellee adopts the statement of jurisdiction set forth in the appellant's brief (Br. 1).[1]

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[1] References to pages of appellant's brief are designated "Br." References to pages of the record are designated "R." References to Government exhibits are designated "Ex." References to defense exhibits are designated "Def. Ex."

PRELIMINARY STATEMENT

The appellant's brief should be stricken for failure to comply with Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit and more particularly subsections (c), (d) and (e) thereof. The appellant has abused the rule of the court requiring the brief to contain a concise abstract or statement of the case, which would present succinctly the questions involved. Further, the appellant has referred to certain specifications of errors, but they are so interwoven and commingled, with references backward and forward in the brief that the arguments are impossible to find and impractical to follow. True the appellant has consumed eighty pages, the maximum under the rules, to present his "argument", but the length of the same has only increased the difficulty rather than relieved it.

The appellee believes that the appellant intended to raise the following points:

1. That the appellant properly claimed the privilege under the Fifth Amendment of the Constitution of the United States in refusing to answer the five questions of which he was found guilty by the court.

2. That in any event no proper foundation was laid by the committee directing the appellant to answer two of the questions.

3. That the five questions were not pertinent, or at least they were not proven to be such by the government.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 2, U.S.C. (1948 ed.) Section 192 is set forth in appellant's brief (Br. 2).

The Fifth Amendment to the Constitution of the United States is set forth in appellant's brief (Br. 2).

COUNTER-STATEMENT OF THE CASE

The appellant appeared before the House Un-American Activities Committee on June 14, 1954 at Seattle, Washington. On that day he refused to answer ten questions and was subsequently cited for contempt of Congress. On September 15, 1954 an Indictment was returned against the appellant charging him in ten counts for each question he refused to answer (R. 3).

On March 7, 1955 the appellant waived a jury trial (R. 7) and the case came on for trial before the court on March 14, 1955. Appellant did not take the stand. The court found the appellant guilty of the offenses stated in Counts I, II, VIII, IX and X (R.

Sentence and Order of Probation was signed and filed on March 25, 1955 finding appellant guilty on each of said five counts, and as to each count imposing a fine of $250 and imprisonment for six months, both fine and imprisonment being concurrent, with the imprisonment suspended and appellant to be placed on probation for 2 years (R. 9). From this Judgment the appellant filed Notice of Appeal on March 25, 1955.

The five counts (I, II, VIII, IX, and X) on which appellant was found guilty were:

COUNT I.

Will you tell the committee please, briefly, what your employment record has been since 1935?

COUNT II.

How were you employed in 1948?

COUNT VIII.

Who are the other people, then, when you used the word "we", that are associated with you in this movement?

COUNT IX.

But what is the name of the group?

COUNT X.

Does the group that you referred to have an office with you in the same office that you work in?

ARGUMENT

POINT I.

Privilege Under the Fifth Amendment of the Constitution of the United States.

(a) *Setting*:

The entire transcript of the proceedings concerning the appellant (Def. Ex. A-4) when called before the committee is set forth in Appendix "A" in this brief.

Appellant claims the committee treated him in a hostile and accusatory fashion (Br. p. 17). This claim, however, is not borne out when the entire proceeding is read as it actually occurred. By pulling a question out of context, the actual setting is distorted. But, be that as it may, a contumacious witness has no right to impugn the motives of the committee or its individual members. *Morford v. United States*, 176 F. 2d 54 (CA DC); *United States v. Orman*, 207 F. 2d 148 (CA 3). The remedy for unseemly conduct, if any, of a Committee of Congress, is a matter for Congress and not for the Courts. *Barsky v. United*

States, 167 F. 2d 241, 250 (CA DC); *Eisler v. United States*, 170 F. 2d 273, 279 (CA DC); *United States v. Orman, supra.*

Appellant claims to have been submitted to an opprobrium before a wide television and radio audience (Br. 18). However, appellant made no complaint concerning this and the one complaint he did make that in any way relates to this subject was taken care of as shown in Appendix "A", pp. 18, 19. Therefore, the case of *United States v. Kleinman*, 107 F. Supp. 407 (DC DC) which appellant cites is not in point because in the *Kleinman* case the witness at the outset of the hearing complained of the presence of television and newsreel cameras. That was not the case here, for this point was raised for the first time during the trial before the District Court. In *United States v. Moran*, 194 F. 2d 623 (CA 2), the court held that a hearing before a Congressional Committee where microphones, television cameras and photographers were present, was not so lacking in decorum that it could not be regarded as "a competent tribunal".

The appellant next asserts the defense of "entrapment". This defense, in this type of case, is not only lacking in argument by appellant, as well as reasoning, but, likewise, in case authority.

(b) *Due Process*:

Here appellant suggests the first (Br. 36) of nine (Br. 36, 39, 43, 54, 58, 59, 60, 62, 63) hop, skip and jump routines incorporating by reference, reference back, reference forward, and adopting part of an argument to be made in the future or one already made in the past, in order to present his arguments to this Court. It requires an acrobatic mind well trained in mental gymnastics to follow these requests of appellant and affords little opportunity to the appellee to condense its argument in reply thereto.

Appellant claims he was deprived of his liberty to answer the charges made and to be represented by effective counsel (Br. 36). Actually appellant was given opportunities to answer all the questions propounded during the committee hearing (Appendix "A") and he was in no way deprived of his liberty to answer the charges made against him as is adequately reflected by the record in this case. As to the deprivation of the appellant to be represented by effective counsel, it must be pointed out that appellant was represented by John Caughlan, attorney and member of the Washington State Bar (Appendix "A" p. 18) who was chosen by appellant to represent him. Mr. Caughlan represented several other witnesses before the same committee. This complained of error is without

merit and is now raised for the first time on this appeal.

(c) *Waiver*:

As to Counts VIII, IX and X, appellant asserts that he did not waive his privilege. Let us assume for the moment for the sake of argument that he did not waive his privilege as to those three counts composed of the following questions respectively: *Count VIII*, "Who are the other people, then, when you used the word 'we' that are associated with you in this movement?" *Count IX*, "But what is the name of the group?" *Count X*, "Does the group that you referred to have an office in the same office that you work in?" The "we", "movement", "group" and "office" all refer to a long answer given by the appellant which is found on p. 39 of Appendix "A".

Appellant refused to answer the above questions and gave as his reason, among others, that "I have no choice but to decline to answer the question, invoking my privileges under the fifth amendment not to bear witness against myself" (Appendix "A" p. 40). Nowhere in the record is there a suggestion that an answer to any one of those three questions would furnish a possible link in the chain of evidence to prosecute the appellant for a crime. Counsel for appellant in argument does not even suggest by way of argument

such a possibility. On the contrary, the entire proceedings before the committee, together with the record in this case, negative such a possibility.

Now may we turn to the question that the appellant had waived his privelege. The claim of privilege under the Fifth Amendment is available to a witness only when his answer may tend to incriminate him. Here the appellant gave a long and complete (as far as it went) answer to a question concerning his profession (Appendix "A" p. 39). Obviously appellant intended that the committee hear his answer and hearing it, that they understand it. The questions in Counts VIII, IX and X were propounded for that reason, to understand his long answer. In the setting, this answer was given orally, even when it is reduced to writing it is difficult to understand and the committee had the right as well as the duty, to clear it up on the record. There is nothing suggested that an answer would result in "injurious disclosure". The protection afforded by the fifth amendment is stated in *Hoffman v. United States*. 341 U.S. 479 at page 486:

> "But this protection *must* be confined to instances where the witness has *reasonable cause* to apprehend danger from a direct answer. *Mason v. United States*, 244 U.S. 362, 365 (1917) and cases cited." (Italics supplied.)

Appellant argues (Br. 42) that he was frank in

discussing his work, even though his answer was non-relevant. The relevancy of a question is not determined by the answer given but by the question propounded. *United States v. Orman*, 207 F. 2d 148 (CA 3).

When some of the committee members advised the appellant that he had waived his privilege by his long answer, this was done properly. For appellant was asked what his profession was and he gave the fullest details, the committee merely wanted clarification. Had the appellant replied instead that his profession was one of "earning money", then to pry into details and clarification of that answer might very well incriminate.

(d) *Tend to Incriminate; Link in Chain of Evidence*:

Appellant suggests to the court that he wishes to stress the possibility of his being exposed to perjury if his testimony is at variance with the testimony of others (Br. 46). Variable testimony as such is not the basis for perjury charges. Practically every lawsuit, both civil and criminal, has variable testimony. Be that as it may, the appellant does not suggest one instance in this entire record where there is or may be a variance. It may well be suggested here that the trial court let into evidence, because as it announced this case was being tried to the court and not a jury,

every exhibit offered by the appellant from newspaper clippings to appellant's grades in the University of Washington. Nowhere in all these exhibits offered by the appellant and received into evidence is there any reference to variable testimony, or statements reflecting that the appellant was "being exposed to perjury". An answer to the questions asked in the setting in which they were asked, could not possibly have incriminated him. *Marcello v. United States*, 196 F. 2d 437 (CA 5). Neither of the requirements mentioned in *Hoffman v. United States*, *supra*, at page 486:

> "To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

are evident here. Even though the appellant repeats this same quotation twice (Br. 52 and 53), its meaning is not changed and there is some little requirement in order to justify the invoking of the privilege. Appellant argues about "link" in the "chain" of evidence (Br. 53), but his argument lacks both link and chain. Chains of argument, like evidence, require "links" and neither can exist without them.

POINT II.

Failure of the Committee to Direct Appellant to Answer Questions After He Had Refused.

Appellant advances this point *only* as to Counts II and VIII (Br. 39) and advances it for the first time on this appeal, never having raised the point in the court below. The Judgment and Sentence in this case is general in its nature in that there is a finding of guilty on all five counts with identical fines and imprisonments, together with suspension and probation on each separate count, all running concurrent and not consecutive with each other. The record does not contain a direction to answer Count II or Count VIII. The cases of *Quinn v. United States*, 349 U.S. 155; *Emspak v. United States*, 349 U.S. 190; *Bart v. United States*, 349 U.S. 219, were decided on May 23, 1955, the Judgment in the instant case was entered on March 25, 1955 (R. 9). Therefore, there existed the opinion of the Circuit Court of Appeals for the District of Columbia which was announced in *Bart v. United States*, 203 F. 2d 45, where no express overruling of an objection by the committee was required and the witness need not be expressly directed to answer the question. The appellant was directed to answer the questions in Counts I, IX and X.

Point III.

Pertinency of Questions.

The powers and duties of the Committee on Un-American Activities are set forth accurately by the appellant (Br. 62, 63).

Pertinency requires that the questions asked can reasonably be said to be related to the matters covered by the Congressional resolution. *Sinclair v. United States*, 279 U.S. 263. A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad. *Townsend v. United States*, 95 F. 2d 352 (CA DC). The facts called for by the questions in the instant case are so related to the subjects covered by the House Resolution (Ex. 2) as to leave no doubt as to their pertinency. It is the question that must be pertinent. *United States v. Orman*, 207 F. 2d 148 (CA 3). Pertinency in Congressional investigations is necessarily broader than relevancy in the law of evidence. *Bowers v. United States*, 202 F. 2d 447 (CA DC). Also in the *Bowers* case, *supra*, the court stated that if the context of the question is plainly pertinent then the burden is *ipso facto* satisfied.

In determining whether the questions are pertinent to the subject matter under inquiry by the com-

mittee there is actually required a two-step proposition. *First*, the scope of the committee's power must be established. This has been accomplished by the House Resolution in evidence (Ex. 2) and set forth in appellant's brief (Br. 62). *Second*, it must be established that the particular question was pertinent to the subject matter about which the committee was authorized to inquire. The first step has been met (Ex. 2). The second step has been met by reference to Appendix "A". Further satisfaction is found in the record itself. The purpose for calling the appellant as a witness (R. 28) is set forth as follows:

(Direct Testimony of Frank S. Tavenner, Jr.)

Q. Now what was the purpose for calling or the reason for calling the defendant before the Committee?

A. Well, the Committee being engaged in the investigation in which it was engaged had learned that this witness in all probability had facts within his knowledge which would have been of value to the Committee in performing its investigative duties.

The purpose for asking questions found in Counts I and II (R. 30) is set forth as follows:

(Direct Testimony of Frank S. Tavenner, Jr.)

Q. What was the purpose in asking the defendant that particular question?

A. There were several purposes for asking the

question. One was the question of proper identification of the witness. Another question was — another point was this, that the Committee in order to investigate the knowledge which it understood this witness may have regarding communist party activities desired to know his background in the community. That is, how he was employed, what his opportunities for knowledge were in the various fields in which the Committee was interested. Those are the principal things that occur to me now.

The purpose for asking questions found in Counts VIII, IX and X (R. 34) is set forth as follows:

(Direct Testimony of Frank S. Tavenner, Jr.)

Q. Can you state what the purpose for asking that particular question was?

A. That question, and I should have said in regard to the other question what I am proposing to say now, was also for the purpose of ascertaining facts relating to the man's identity and the business in which he was then engaged. So it was for the dual purpose of identifying the witness more definitely and it was also for the purpose of ascertaining what opportunities this witness had of knowing matters regarding which the Committee was interested in and at the moment I don't recall what else Congressman Clardy may have (sic) had in mind. To me that was what was the purpose of the question.

In the *Bowers* case, *supra*, the court stated that pertinency does not depend on the probative value of the answer.

The resolution authorizing the inquiry by this committee does not require the precision needed for a criminal statute. A resolution authorizing an investigation in general terms is sufficient. *Barsky v. United States*, 167 F. 2d 241, 248 (CA DC).

That no proposed legislation is pending or may result from the information requested of the appellant by the questions asked is of no concern in determining pertinency. Actually, the result of such inquiries may be to advise Congress so as to prevent and avoid the enactment of detrimental legislation. *United States v. Dennis*, 72 F. Supp. 417; *United States v. Josephson*, 165 F. 2d 82 (CA 2).

Appellant argues that the committee knew the answer to the question in Count X (Br. 66), therefore the question was not pertinent. The answer, or the lack of one, does not establish the pertinency of the question asked (R. 125, 126). It is the question which must be pertinent, and the refusal to answer, or an innocent true answer does not destroy the pertinency of the question. *United States v. Orman, supra.*

CONCLUSION

Except as to Counts II and VIII, where there was no specific overruling by the committee to the appellant directing him to answer after his refusal, the conviction of the appellant should be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

RICHARD D. HARRIS
Assistant United States Attorney

Attorneys for Appellee

APPENDIX "A"

Testimony of Carl Harvey Jackins, Accompanied By Counsel, John Caughlan

MR. VELDE. Will you raise your right hand, Mr. Jackins?

In the testimony that you are about to give before this committee, do you solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

MR. JACKINS. I do.

MR. VELDE. You may be seated.

MR. TAVENNER. Will counsel identify himself for the record, please?

MR. CAUGHLAN. Yes. I am John Caughlan, attorney and member of the Washington State bar. Do you want my address?

MR. TAVENNER. Yes.

MR. CAUGHLAN. 702 Lowman Building, Seattle. Could I make an inquiry?

MR. TAVENNER. Yes.

MR. CAUGHLAN. In case I care to confer with Mr. Jackins or Mr. Jackins cares to confer with me, what is the situation as far as these microphones are concerned? Is our confidential conference going to be broadcast over it?

MR. TAVENNER. I think if you conduct your conversation discreetly it will not be heard on the magnifying system. Otherwise you may move back a little.

Have just been told that if you give a signal it will be cut off completely, so you will be running no risk whatever.

MR. CLARDY. I think, Mr. Chairman, that it would be well to let the record show that the committee

has asked those in charge of the radio and television to cut the volume down if they want to confer.

MR. VELDE. Yes; the record will so show.

Our committee rules, of course, provide that the witness shall have ample opportunity to confer with his counsel in private, and I want to caution those in charge of the broadcast here, both radio and television, that anything that comes out on the air between the counsel and the witness will be certainly objectionable to the committee's procedure.

MR. DOYLE. Mr. Chairman.

MR. VELDE. Mr. Doyle.

MR. DOYLE. May I emphasize this point? I am sure that the committee would agree that if counsel feels that he is not far enough removed from the microphones when he is conferring with his client, the committee would want him to remove himself far enough away from the microphones so that he feels comfortable in his consultation with his client.

MR. VELDE. Certainly, and that permission will be granted. Proceed Mr. Counsel.

MR. TAVENNER. What is your name, please sir?

MR. JACKINS. Harvey Jackins.

MR. TAVENNER. Will you spell your last name, please?

MR. JACKINS. Certainly. J-a-c-k-i-n-s.

MR. TAVENNER. When and where were you born, Mr. Jackins?

MR. JACKINS. I was born June 28, 1916, in northern Idaho.

MR. TAVENNER. Where do you now reside?

MR. JACKINS. In the city of Seattle, sir.

MR. TAVENNER. How long have you lived in the city of Seattle?

MR. JACKINS. A number of years, sir.

MR. TAVENNER. Approximately how long?

MR. JACKINS. Approximately 20.

MR. TAVENNER. Will you tell the committee, please, what your educational training has been, that is, your formal educational training?

MR. JACKINS. I think so. I have been to grade school; I have been to high school; I have been to college.

MR. TAVENNER. How many years have you had in college?

MR. JACKINS. Somewhat less than 4 years.

MR. TAVENNER. At what institution?

MR. JACKINS. At the University of Washington.

MR. TAVENNER. When did you complete your training at the University of Washington, in what year?

MR. JACKINS. I have not completed my training at the University of Washington.

MR. TAVENNER. At what time did you stop your work at the University of Washington?

MR. JACKINS. The last work that I took at the University of Washington, I believe, would be around 1950.

MR. TAVENNER. How many years had you been in attendance at that university immediately prior to 1950? In other words, was there a gap in your attendance at the University of Washington?

MR. JACKINS. Yes.

MR. TAVENNER. Of a period of years?

MR. JACKINS. Yes, there was.

MR. TAVENNER. Will you explain it briefly to us?

MR. JACKINS. Well to the best of my recollection, I took no class work at the University of Washington between the years of 1937, or thereabouts, and around 1950.

MR. TAVENNER. Were you in the Armed Forces at any time between 1937 and 1950?

MR. JACKINS. I would like to confer with counsel, sir.

MR. VELDE. You will have that opportunity.

(At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. VELDE. I can hear you conferring. I would suggest that you move farther back from the microphone.

MR. JACKINS. It is not necessary.

MR. VELDE. All right. Proceed. Answer the question, please.

MR. JACKINS. Would you repeat it?

MR. TAVENNER. Did you serve in the Armed Forces of the United States at any time during the period 1937-50?

MR. JACKINS. I did not.

MR. TAVENNER. Will you tell the committee, please, briefly, what your employment record has been since 1935?

MR. JACKINS. Well, because of the character of this committee and the nature of these hearings, I must decline to answer that question, claiming my privilege under the fifth amendment to the Constitution not to bear witness in any attempt on the part of this committee to involve me.

MR. CLARDY. Mr. Chairman.

MR. VELDE. Mr. Clardy.

MR. CLARDY. I ask that he be directed to answer the question.

MR. VELDE. Certainly. That is a very simple question and the Chair sees no way in which it can incriminate you to answer it whatsoever. You are directed to answer the question.

MR. JACKINS. What the Chair sees and what might be the facts in the situation are not necessarily the same, Mr. Chairman. I have declined to answer, invoking my privilege under the fifth amendment not to bear witness against myself in any attempt on the part of this committee, considering these circumstances, to involve me.

MR. VELDE. And upon further consideration, you still invoke the fifth amendment, upon the Chair's direction that you answer the question; is that correct?

MR. JACKINS. I have been informed by counsel that if I were to give testimony before this committee which would be at variance with witnesses who have appeared before this committee, seeking to curry favor of the committee because of prison sentences hanging over their head, that regardless of the obvious lack of integrity of such witnesses I would still be subjected to possible charges of perjury.

MR. VELDE. Mr. Witness, the testimony of the previous witness has nothing to do with your testimony.

MR. JACKINS. It has a great deal to do with the situation.

MR. VELDE. Will you answer the question? Or do you refuse to answer?

MR. JACKINS. I have answered very clearly. I decline to answer that question under my privileges guaranteed under the fifth amendment not to bear witness against myself in any attempt on the part of this committee, considering the circumstances, to involve me.

MR. VELDE. And upon direction by the Chair to answer the question as to your previous employment, you still refuse to answer upon the grounds of the fifth amendment; is that correct?

MR. JACKINS. I have answered that very clearly, Mr. Chairman.

MR. VELDE. How do you mean that—that you answered it very clearly? By refusing to answer? Can you tell me of one way in which giving us the benefit of your previous employment can possibly incriminate you?

MR. JACKINS. Under other circumstances, Mr. Chairman, I would be very glad to discuss those questions, with you or with anyone else, but under the conditions of this hearing and the character of this committee I must decline to answer that question as well, invoking my privilege under the fifth amendment not to bear witness against myself.

MR. VELDE. Very well. Proceed.

MR. TAVENNER. How are you now employed, Mr. Jackins?

MR. JACKINS. I am employed as a personal counsellor.

MR. TAVENNER. In what type of business?

MR. JACKINS. In the field of professional personal counseling.

MR. TAVENNER. How long have you been so employed?

(At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. JACKINS. Three and a half years, approximately.

MR. TAVENNER. That would take you back to 1950 or 1951, approximately, would it not?

MR. JACKINS. Approximately.

MR. TAVENNER. How were you employed in 1948?

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, claiming my privilege under the fifth amendment not to bear witness against myself in any attempt to involve me.

MR. TAVENNER. Did you hold an official position in 1948 or at any time prior thereto in Local 46 of the International Brotherhood of Electrical Workers?

MR. JACKINS. Under other circumstances, I would be glad to discuss that, but considering the nature of this committee and the character of these hearings I must decline to answer that question, claiming my privilege under the fifth amendment to the Constitution not to bear witness against myself in any attempt to involve me.

MR. VELDE. May I ask the witness this question? Under what other circumstances would you be willing to answer that question?

MR. JACKINS. Under conditions otherwise than before this committee, Mr. Chairman. I would be glad to discuss the entire issue with you publicly.

MR. VELDE. To whom would you give an answer to that question other than to members of this committee?

(At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. JACKINS. Mr. Chairman, I would be glad to discuss these issues with you, say, in public debate, in a public discussion before a friendly—before an audience or before the general public. The actions of this committee in presenting testimony—

MR. SCHERER. Mr. Chairman.

MR. JACKINS. From thoroughly discredited people and people without integrity this morning has

left me with no choice but to decline to answer that.

MR. CLARDY. Regular order, Mr. Chairman.

MR. VELDE. Regular order is ordered.
Would you go under oath before me and discuss this question as to your employment—on any matters involving your connection with the Communist Party?

MR. DOYLE. I think, Mr. Chairman, that he has volunteered——

MR. VELDE. Just a moment, Mr. Doyle.
May I ask if he will answer this question, please?

MR. JACKINS. In your present capacity, Mr. Chairman?

MR. VELDE. Yes; in my present capacity, naturally.

MR. JACKINS. My answer would be the same as I have made.

MR. CLARDY. May I suggest something, Mr. Chairman?

MR. VELDE. The Chair recognizes the gentleman from Michigan.

MR. CLARDY. May I point out that since he has indicated a willingness to answer these questions before other people, he has waived any protection that he might claim under the fifth amendment, and I ask that he be directed to answer that last question.

MR. VELDE. Yes; I think the gentleman from Michigan is aabsolutely right. You are directed to answer the last question.

MR. CLARDY. Mr. Chairman.

MR. VELDE. Mr. Clardy.

MR. CLARDY. So that the record may be complete at this point I want to make this observation, so that we will not overlook it. When he has stated that

he is willing to answer that question under certain other circumstances or to other people, it is obvious that any claim that there is any protection afforded him by the fifth amendment is false, because if he is willing to state it to others then there can be no possibility of it incriminating him.

MR. VELDE. I am usually entirely in agreement with the gentleman from Michigan, but I believe that he has not stated that he would answer if he were under oath at the present time.

MR. CLARDY. I do believe there is a distinction, Mr. Chairman, and his statement that he is willing to answer it indicates that there can be no incrimination, because if he gives testimony somewhere else under oath or otherwise, he has at least touched upon the subject of which he is now apprehensive—if he has any such apprehension—and that, obviously, removes any possibility of claiming the fifth amendment in good faith. And I am sure that he is not claiming it in good faith but is attempting merely to filibuster and follow the usual Communist Party line.

MR. VELDE. Witness, if we engaged in public debate or if we engaged in a private session, where you came before me personally, would you answer the question that has been put to you about your employment, under oath?

MR. JACKINS. Are you asking that again?

MR. VELDE. Yes. Do you understand the question that has been propounded, Witness?

MR. JACKINS. In the byplay here, I have lost track of where we are. If you would care to present the situation again ——

MR. VELDE. You have been directed to answer the question as to whether or not in a session with me, in my capacity, whether it be public or private, you would answer the question as to your previous employment, under oath — the oath, of

course, to be administered by me?

MR. JACKINS. Might I ask you a question? Is a hypothetical question such as that proper at this point?

MR. VELDE. If you will answer that question, instead of refusing to answer under the grounds of the fifth amendment, then perhaps we might consider the question properly.

MR. JACKINS. It seems to me that to give you an answer to that would only be to express an opinion. If it is your desire that I express an opinion about it, I will.

MR. JACKSON. Regular order, Mr. Chairman.

MR. VELDE. Regular order.

MR. JACKSON. It is quite obvious that the witness has no intention of answering any questions which have to do with his alleged membership in the Communist Party, and I think it is a waste of time to pursue it any further. As far as I am concerned you can ask him the question now and excuse him.

MR. VELDE. Very well. The observation of the gentleman from California is very astute and wise. Are you now a member of the Communist Party?

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I decline to answer that question, claiming my privilege under the fifth amendment to the Constitution not to bear witness against myself in any attempt on the part of this committee to involve me.

MR. VELDE. Have you ever been a member of the Communist Party?

MR. JACKINS. Considering again the character of these hearings and the nature of this committee, I decline to answer that question, claiming my privilege under the fifth amendment to the

Constitution not to bear witness against myself in any attempt to involve me.

MR. VELDE. Proceed with your questions, counsel.

MR. TAVENNER. Mr. Chairman, it was my intent to inquire of this witness as to what knowledge he had regarding Communist Party activities in connection with unions of which he was a member or had official positions with, but the witness has refused to answer that he was even a member of the first union that I mentioned. I think, however, that having asked that question, I should follow it up, even if I do not pursue the others.

MR. VELDE. You may proceed.

MR. TAVENNER. Now were you expelled from local 46 of the International Brotherhood of Electrical Workers in 1948? (At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment.

MR. CLARDY. I suggest, Mr. Chairman, that he be directed to answer that question.

MR. VELDE. Certainly. You are directed to answer that question. The Chair can see no reason why the answer to such a question should incriminate you in any way—— You are directed to answer the question.

MR. JACKINS. What the Chair can see, in the actual situation, need have no meeting ground at all, and again I repeat, considering the character of this committee and the nature of these hearings, I must decline to answer that question, claiming my privileges under the fifth amendment not to bear witness against myself in any attempt on the part of this committee to involve me.

MR. TAVENNER. Were you also expelled as business

agent of the Building Service Employees' Union some time prior to 1948?

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment to the Constitution not to bear witness against myself in any attempt on the part of this committee to involve me.

MR. CLARDY. Mr. Chairman.

MR. VELDE. Mr. Clardy.

MR. CLARDY. May I suggest that the witness be directed to answer that question?

MR. VELDE. Again, without objection, you are directed to answer that question.

MR. TAVENNER. Were you expelled from lodge 751—

MR. VELDE. Just a minute counsel.

MR. TAVENNER. Excuse me, sir.

MR. JACKINS. Where are we now?

MR. VELDE. Again you are directed to answer the last question. Again the Chair and the members of the committee see no reason why you could possibly be incriminated by an answer to that question. You are directed to answer the last question.

MR. JACKINS. The same answer as I gave to the previous question for the reasons that I previously stated.

MR. TAVENNER. Were you at any time expelled from lodge 751 of the Aero Mechanics Union?

MR. JACKINS. The same answer which I gave to the previous questions and for the reasons which I stated.

MR. CLARDY. Mr. Chairman.

MR. VELDE. Mr. Clardy.

MR. CLARDY. I ask that he be directed to answer.

MR. VELDE. Again you are directed to answer the question.

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I decline to answer, invoking my privileges under the fifth amendment of the Constitution not to bear witness against myself in any attempt on the part of this committee to involve me.

MR. SCHERER. Mr. Chairman.

MR. VELDE. Mr. Scherer.

MR. SCHERER. Witness, isn't it a fact that you were expelled from all three of these unions because of your Communist Party activities within the unions? Isn't that a fact?

MR. JACKINS. Considering the nature of this committee and the character of these hearings, I must decline to answer that question and for the same reasons.

MR. SCHERER. Were you on the Communist Party payroll?

MR. JACKINS. The same answer as to the previous question and for the same reason.

MR. SCHERER. Isn't it a fact that you have refused to answer the question as to your previous employment because you were on the payroll of the Communist Party in this country during those years?

(At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. JACKINS. The use of my privileges under the fifth amendment does not in any sense imply that any of your statements are fact. I am invoking my privileges and declining to answer that question under the fifth amendment in order not to bear witness against myself in any attempt on the part of this committee to involve me.

MR. SCHERER. Witness, tell me what part of the

statements I have just made are false then?

MR. JACKINS. I decline to answer that question and for the same reasons.

MR. SCHERER. I thought you would.

MR. JACKINS. You were correct.

MR. CLARDY. May I ask a question, Mr. Chairman?

MR. VELDE. Mr. Clardy.

MR. CLARDY. Was there any reason, other than that cited by Mr. Scherer, for your expulsion from those three unions?

MR. JACKINS. Well, again I would like to draw your attention to the fact that the use of the fifth amendment and my privileges under the fifth amendment does not construe any guilt on my part or the accuracy of any of the statements made by members of this committee. I decline to answer for the reasons previously stated.

MR. CLARDY. Did you ever engage in any espionage activities?

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I must decline to answer, invoking my privileges under the fifth amendment.

MR. CLARDY. Then you won't even answer a question as to whether or not you have engaged in any espionage activities; is that correct?

MR. JACKINS. Considering the nature of this committee and the character of these hearings, I must decline to answer, invoking my privileges under the fifth amendment.

MR. JACKSON. Would a true answer to the question as to whether or not you have ever engaged in espionage activities tend to incriminate you?

MR. JACKINS. To use the fifth amendment and my privileges under it does not in any way imply incrimination.

MR. JACKSON. We understand the provisions of the fifth amendment very well.

The question is, "Would a truthful answer to the question of whether or not you have ever committed espionage tend to incriminate you?"

MR. JACKINS. Because of the nature of this committee and the character of these hearings, I must decline to answer that question, invoking my privileges under the fifth amendment not to bear witness against myself in any attempt of this committee to involve me.

MR. DOYLE. Mr. Chairman.

MR. VELDE. The Chair recognizes the gentleman from California, Mr. Doyle.

MR. DOYLE. My question does not involve the Communist Party. I notice that you said that between 1937 and 1950 you did not render any military service to your own United States Government. Were you excused during those years for any reason from military service, or why didn't you serve? Would that incriminate you, too, if you told the truth in that regard?

MR. JACKINS. Mr. Congressman, I feel that you are trying to bait me on that, but I will try to answer it, if you wish.

MR. DOYLE. I asked it in the hope that you would answer it.

MR. JACKINS. The technical reasons involved in my being excused from military service, I assume you would have to refer to the draft boards to get down accurately. To the best of my knowledge, I was excused from military service during those years for three reasons, in series: the first a question of health—that my service was postponed for a year because of a physical examination which turned up certain health conditions of which I was not previously aware; that again my service

in the Armed Forces was deferred because of a critical emergency involving the repair of fighting ships, where my skill was badly needed at the particular time; and, finally, I was deferred because I was regarded as too old at the expiration of that period.

MR. DOYLE. What draft board excused you for each or any of those reasons? You have your draft card in your pocket, haven't you?

MR. JACKINS. I am unable to give you that information at this time.

MR. DOYLE. Do you have your draft card in your pocket? If you don't, I submit that you ought to have it.

MR. JACKINS. I would have to search through my wallet to see whether I have it with me or not. I have no notion.

MR. DOYLE. What was the number of your draft board and where was it?

MR. JACKINS. I don't remember it—not at this time.

MR. DOYLE. What city was it in?

MR. JACKINS. It was in Seattle.

MR. DOYLE. Under what name did you register for military service?

MR. JACKINS. Under the name which I have given this committee.

MR. DOYLE. How old were you when you registered?

MR. JACKINS. If you can refresh my memory as to the date of the first draft registration, I can tell you.

MR. DOYLE. You don't remember?

MR. JACKINS. It would be not necessarily accurate.

MR. DOYLE. Approximately.

MR. JACKINS. I am told that the first draft registration was in October of 1940.

MR. JACKINS. I would be at that time then approximately 24 years of age.

MR. DOYLE. May I ask one more question, Mr. Chairman?

MR. VELDE. Mr. Doyle.

MR. DOYLE. Every time you pleaded the fifth amendment, I noticed you said "because of the character of this committee." I don't know whether you have a speech ready to make or not—I presume you do—but this committee is composed of Members of your United States Congress. Now do I understand that, because we are Members of the United States Congress and a committee of your Congress, there is something about the character of this committee that you have no respect for or trust in or confidence in? Is that your answer? I assume that that is the basis of your answer. You say "because of the character of this committee," and each one of us is a Member of your United States Congress, comprising a sort of cross-section of the United States Congress, so I assume when you use that language time after time that you are objecting to your United States Congress functioning as we have been authorized to function by the Congress.

MR. JACKINS. Mr. Congressman——

MR. DOYLE. Is that correct?

MR. JACKINS. I think there is a considerable difference between respect for an office and respect for the uses to which it is sometimes put.

MR. DOYLE. Of course the Congress, your Congress, created this committee.

MR. CLARDY. I think you ought to point out that the members were elected unanimously by the Congress to this committee.

MR. VELDE. Not only that, but we should also remind the witness that in this last session of Con-

gress when our appropriations came up before the Congress, they were approved with only one dissenting vote. So that this is a representative body of the people of the United States, who elected the Congress.

MR. JACKINS. Which would not, in itself, establish the character of this committee nor the role which it plays.

MR. JACKSON. The character of this committee and the role which it plays had been established long before the vote to which the chairman refers. In other words, sir, 362 to 1 means that the people of the United States are speaking through their Congress, through this committee, asking people like you to cooperate with the committee, giving us the benefit, giving the Congress the benefit, and giving the American people the benefit of anything you may know about the Communist conspiracy. That you have failed to do completely, and mere words about the character and the motives of this committee isn't going to change the fact that the American people have elected their Congress which in turn established this committee.

MR. JACKINS. Nor would it necessarily indicate the judgment of the people on the work of this committee.

MR. JACKSON. The judgment of the people has already been passed in their vote of their elected representatives.

MR. JACKINS. It will be passed again.

MR. JACKSON. It will be passed again comes the revolution?

MR. JACKINS. I believe that the judgment of the people on committees such as this is being passed, in a large measure, by them being shown to television audiences throughout the country.

MR. JACKSON. We are talking about this committee, sir, and not any other committee, and the work of this committee will be reflected in the response and the reactions we receive from the people of Seattle and the Northwest area which, if it follows the course of other reactions, will be overwhelmingly favorable.

MR. JACKINS. If Mr. Doyle has an honest question as to why I raised that question, I think I can——

MR. CLARDY. Mr. Chairman, the witness has no business insulting Mr. Doyle or the Congress by using the language that he has, and I ask that it be stricken.

MR. JACKINS. I meant no insult to Mr. Doyle.

MR. VELDE. I am sure that Mr. Doyle would not ask any dishonest question whatsoever. Do you want to repeat the question, Mr. Doyle?

MR. DOYLE. I think the witness remembers my question quite clearly. I am sure he remembers it. I don't think, in view of your heavy load of witnesses, that I care to take more time.

MR. JACKINS. Mr. Doyle——

MR. DOYLE. May I say this to you, though, young man? I am very much disappointed in you that, as a young American, you take the position you do. You evidently have leadership ability; you have evidently been a leader in labor; you evidently have been blessed by your country, and I hope that you will reverse your opinion.

MR. JACKINS. You need not be disappointed in me, sir, and I think I could easily explain to you why, but not under conditions such as this.

MR. JACKSON. Mr. Chairman.

MR. VELDE. Mr. Jackson.

MR. JACKSON. We have already taken up, I understand, 40 minutes of time with this witness, with

many witnesses still to be heard. I would very respectfully suggest the regular order.

MR. VELDE. The Chair certainly concurs with the gentleman from California.

Mr. Counsel, do you have any further questions to ask of this witness?

MR. TAVENNER. May I ask the witness one further question?

MR. VELDE. Proceed.

MR. TAVENNER. I think I should advise the witness that there has been heard in executive session before this committee the witness Elizabeth Boggs Cohen and the witness Leonard Basil Wildman, both of whom were heard on May 28, 1954, and both of whom identified you as at one time having been an active member of the Communist Party, Mr. Wildman having identified you as the organizer of a branch of the Communist Party while you were in attendance at the University of Washington.

This is your opportunity, if you desire to take advantage of it, of denying those statements, if there is anything about them which is untrue.

MR. JACKINS. Is that a question?

MR. TAVENNER. Yes. Do you desire to deny any part of that identification?

MR. JACKINS. Considering the character of this committee and the nature of these hearings, I must decline to answer that question, calling upon my privileges under the fifth amendment to not bear witness against myself in any attempts of this committee to involve me.

MR. TAVENNER. Have you ever been a member of the Communist Party?

MR. JACKINS. The same answer as before for the same reasons.

MR. TAVENNER. I have no further questions, Mr. Chairman.

MR. VELDE. Mr. Jackson?

MR. JACKSON. No questions.

MR. VELDE. Mr. Clardy?

MR. CLARDY. Witness, you told us that at present you were engaged in an occupation that I didn't quite understand. What is it that you are doing at the moment?

MR. JACKINS. I am engaged in the work of personal counseling.

MR. CLARDY. What do you mean by personal counseling? That is what I do not understand.

MR. JACKINS. I work with individuals to help them with their personal problems.

MR. CLARDY. What kind of personal problems?

MR. JACKINS. With their emotional difficulties, with the inhibitions which keep them from functioning well as individuals.

MR. CLARDY. Are you a medical expert or a psychiatrist of some kind?

MR. JACKINS. Not at all. The approach is quite different than either of those fields.

MR. CLARDY. Do you belong to some profession of some sort that is licensed by the State to engage in this kind of activity, or is this something that you have invented yourself?

I am serious about this. I want to know, because I don't understand.

MR. JACKINS. May I have a little latitude in explaining it, sir?

MR. CLARDY. I haven't limited you.

MR. JACKINS. Fine. I am working with a very new approach to the problem of individual human

beings. We have discovered, a group of us, that apparently anything wrong with an individual human—any limitation on his ability, his enjoyment of life, his ability to be intelligent in any situation—is purely and solely the result of the experiences of hurt which he has endured, including emotional distress, quite as important as experiences of physical pain; that anything less than rational or able about an individual human being can be traced as the literal expression of experiences when he has been hurt, beginning very early and accumulating, and that it is possible in a teamwork relationship for one person's intelligence as a counselor to be linked with that of the person who is enduring the difficulty or the limitation or the emotional problem—to go back in memory, in effect and, by repetitively seeking out these experiences of hurt, discharging the stored up painful emotion; and in assisting the person to think them through over and over and over again, it is possible to free an individual from the inhibiting effects of the distresses which have stored up on him during his life.

Now this is a very exciting field; the possibilities implicit in it—and we are pioneering in the group with which I work—are amazing.

MR. CLARDY. What do you mean by "we"? Is this something originated by the Communist Party as part of its program?

MR. JACKINS. Considering the character of the committee and the nature of these hearings, I must decline to answer that question, calling upon my privileges under the fifth amendment to not bear witness against myself in any attempt of this committee to involve me.

MR. CLARDY. Mr. Chairman, I ask that he be directed to answer.

MR. VELDE. Just a moment, Mr. Clardy.

May I again direct the physical audience that are present here that the committee cannot operate as it should under the duties it has with any disturbances of either expressions of approval or disapproval, and the chair and the committee would appreciate it if the physical audience present would not laugh or make any demonstrations whatsoever, either of disapproval or of approval.

MR. CLARDY. Now, Mr. Chairman, would you direct him to answer the last question?

MR. VELDE. Will the reporter read the question, please?

(Question read.)

MR. CLARDY. I ask that he be directed to answer that question.

MR. VELDE. Yes; the Chair directs you to answer that question. Is it part of the Communist Party program?

MR. JACKINS. I must decline to answer that question for the reasons previously stated.

MR. CLARDY. Who are the other people, then, when you use that word "we," that are associated with you in this movement?

(At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. JACKINS. Under the conditions of this hearing and considering the nature of the committee, I must decline to answer that question.

MR. CLARDY. I think I should caution you, Witness, that you do not have to decline to answer anything. I am assuming when you say you must that you mean you are. Am I correct?

MR. JACKINS. Certainly.

MR. CLARDY. You have been saying "I must decline."

MR. JACKINS. For the reasons stated, sir.

MR. CLARDY. Very well. Are those that you asso-

ciate with the persons that have been identified in this proceeding as members of the Communist Party?

MR. JACKINS. I decline to answer the question for the reasons previously given.

MR. CLARDY. Have you ever been a member of any organization whose avowed purpose is the overthrow of this Government through the use of force and violence?

MR. JACKINS Under the conditions of this hearing and considering the nature of the committee, I must decline to answer that question, invoking my privileges under the fifth amendment not to bear witness against myself.

MR. CLARDY. Very well. One final question.
Will you give us the names of the persons you are associated with in this activity that you have described?

MR. JACKINS. I must decline to answer for the reasons previously given.

MR. CLARDY. Mr. Chairman, I ask that he be directed to answer.

MR. VELDE. Yes; the chairman directs you to answer that last question.

MR. JACKINS. I decline to answer the question for the reasons previously given.

MR. CLARDY. That is all I have.

MR. VELDE. Mr. Scherer.

MR. SCHERER. No questions.

MR. VELDE. Mr. Doyle?

MR. DOYLE. I have two questions.
You are the one that volunteered that your present occupation was working with a group, and in my book that is a waiver of your privilege under the fifth amendment.

But what is the name of the group?

(At this point Mr. Jackins conferred with Mr. Caughlan.)

MR. JACKINS. Sir, I believe that the committee has sought to involve me in a trap on this question. Were I to decline to answer the question, certainly it is conceivable that I will be threatened with contempt charges, but, on the other hand, to answer it would lead to all sorts of other involvements, as I have tried to explain previously; so that in the circumstances, I have no choice but to decline to answer the question, invoking my privileges under the fifth amendment not to bear witness against myself.

MR. CLARDY. Mr. Doyle, I think you should ask the Chair to direct him to answer it, because I think this is clearly beyond the pale.

MR. DOYLE. I ask that the chairman direct the witness to answer that question.

MR. VELDE. Certainly. There is no possible way that you can incriminate yourself by an answer to that question. You are directed to answer the question, Mr. Witness.

MR. JACKINS. I decline to answer it for the reasons previously stated.

MR. DOYLE. I have two more questions.

Does this office have an address here in Seattle?

Do you work with a group in an office in some building? If so, where is that office?

MR. VELDE. May I suggest, Mr. Doyle, that you ask one question at a time.

Would you ask him the first question again?

MR. DOYLE. Yes.

You volunteered that you were working with a group. Does that group have an office in Seattle?

MR. JACKINS. I work in an office in Seattle.

MR. DOYLE. Does the group that you referred to have have an office, with you in that same office that you work in?

MR. JACKINS. I decline to answer that question for the reasons previously stated.

MR. DOYLE. Do you have a business card on you, a professional card that you use for identification of your work as a professional adviser? If you have, will you please present me with one or present the counsel with one for identification?

MR. VELDE. I respectfully suggest that you ask him whether or not he has such a card.

MR. JACKINS. To my knowledge, I have no card with me.

MR. DOYLE. If you have one on you, would you please give it to us? You carry a business card or a professional card, don't you?

Why don't you answer honestly on that?

MR. JACKINS. I said I do not have one with me, to my knowledge.

MR. DOYLE. Do you sell your services for a fee, a professional fee? Do you collect a fee for professional advice you give?

MR. JACKINS. I decline to answer that question.

MR. DOYLE. Is there a membership fee paid to the group that you claim to be a member of?

MR. JACKINS. I decline to answer that question for the reasons previously stated.

MR. VELDE. Mr. Frazier.

MR. FRAZIER. No questions.

MR. VELDE. Is there any reason why this witness should not be dismissed?

MR. TAVENNER. No, sir.

MR. VELDE. Very well. The witness is dismissed.

MR. JACKINS. May I ask, am I dismissed for the duration of these hearings?

MR. VELDE. You are dismissed.

MR. CAUGHLAN. Can he be excused from the hearing room and not return at all?

MR. TAVENNER. Yes, you are dismissed.

(Witness was excused.)

MR. VELDE. Call your next witness.

No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

ARTHUR G. BARNETT
1304 Northern Life Tower
Seattle 1, Washington
Attorney for Appellant

No. 14748

IN THE

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CARL HARVEY JACKINS,

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TABLE OF CASES

Page

Bowers vs. United States, 202 F. 2nd 447 (CA DC) 7, 8

United States vs. Josephson ,165 F. 2nd 82 (CA 2) (1948) 8

United States vs. Kleinman, 107 F. Supp. 407 (DC DC) 2

United States vs. Moran, 194 F. 2nd 623 (CA 2 1952) 7

United States vs. Orman, 207 F. 2nd 148 (CA 3)... 8

MISCELLANEOUS

The Fifth Amendment Today, Edwin N. Griswold 3, 4

No. 14748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL HARVEY JACKINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

Reply to Appellee's Preliminary Statement

The questions in this case are involved, some dealing with matters on which there is little law. Appellant's whole life is affected by this appeal from a criminal conviction. Therefore, it is Appellant's opinion that he has not violated Rule 18(c) (d) and (e) of this Court.

I.

Appellee (Br. 16) concedes that Counts II and VIII should be dismissed.

Thus the appeal now concerns Counts I, IX and X.

II.

Count I concerns appellant's employment record since 1935. Appellant (Br. 45-48; 59-61) shows that Count I is within the privilege against self-incrimination.

III.

This then leaves Counts IX and X.

Appellee's Brief: Page 5—Setting.

Appellant shows nineteen questions and statements by the committee (Br. 18-21) and did not pull a "question out of context" (Appellee's Br. 5). These were set forth not to impugn the motives of the Committee but to show the hostility and unfairness of the hearing and its atmosphere. Similarly, the presence of the radio, T.V., and newsreel cameras was set forth to show the unfairness of being exposed thereto without an opportunity to have equal time to make clarifying statements to accusations and unfair references made by the Committee. Thus the importance of *U. S. vs. Kleinman* 107 F. Supp. 407 (DC DC) was that the refusal of the defendant to testify was justified because of the circumstances of the hearing. Furthermore, appellant

does not object to the apparatus per se but rather to being exposed thereto without his consent and without equal opportunity to use said media.

> ". . . Of very great importance, I believe, is a rule protecting the witness from having to submit to broadcasting, television, newsreel cameras, or any other form of recording or reproduction, except the ordinary stenographic transcript. Even flashing flash bulbs can be an indignity and a source of strain to a witness. It is high time that we recognized and accepted the fact that legislative investigations are not a part of show business. Witnesses should not be required to testify in order to provide a spectacle for the public. Requiring testimony under such conditions is not compatible with any sound notion of due process of law, and I would expect our courts, as some have already done, to uphold a witness who refuses to testify for broadcast of any sort. We even have had Congressional investigations put on with sponsors with advertising during the intervals. Can anyone possibly defend such a practice?" Erwin N. Griswold, "The 5th Amendment Today," Pages 47-48.

Appellee's Brief: Page 7—Due Process.

Appellee fails to distinquish charges from an opportunity to answer questions. It is not fitting for appellee to argue that appellant should have answered all the questions propounded in order to maintain his "liberty." The law recognizes the opportunity not to answer questions within the privilege against self-incrimination. For e.g. the trick questions involving espionage (Appellant's Br. 20) such as "You mean you won't even answer the question whether or not you

have engaged in any espionage activities? Is that correct?" (R 98) and again, "Would a true answer to the question as to whether or not you ever engaged in espionage (activities) tend to incriminate you?" (R 99) These are the kind of questions that can not be answered with a "yes" or a "no". And yet the record of the hearing is filled with similar examples (Appellant's Br. 18-21).

Appellee confuses consultation with an attorney with representation by an "effective" attorney (Appellee's Br. 7). See Appellant's brief, Appendix "B", page f, the last several lines, where the Committee at the same hearing in which appellant was involved stated "Mr. Counsel, if necessary, we will have you escorted from the room if you do not desist." Appellant's brief sets forth the considerable concern by noted scholars over the lack of "effective" counsel at these hearings. See Appellant's brief, Appendix "F."

> ". . . In many committees now, the right to counsel is formally recognized. But counsel, though present, is restricted to giving advice when called upon. He cannot address the committee; and counsel who have sought to do so have been ejected from hearing rooms. The right should be a right to effective counsel, and not the mere shadow of that right that has been recently allowed," Griswold, supra, Page 47.

IV.

Appellee's Brief: Page 8—Waiver.

It is impossible to understand appellee's argument on waiver as affecting Counts VIII, IX and X, because appellee will not meet the point made in appellant's brief that it is impossible to consider these Counts unless one considers Count VII. These Counts are all related in context. An examination of the record (R 5; 108-109) shows that dismissed Count VII "Is this (work of personal counseling) something originated by the Communist Party as part of its program?" follows a previous question "May I ask you what do you mean by 'we'? Is this something originated by the Communist Party as part of its program?" and another question followed concerning the Communist Party; then immediately followed Count VIII, "Who are the other people then when you use that word 'we' that are associated with you in this movement?" Then follows another question ". . . are those that you associate with persons that have been identified in this proceeding as members of the Communist Party?" Then another question about membership in any organization whose purpose is the overthrow of the Government through the use of force and violence. Then continuing the context associated with Count VII, the Committee asked again for the names of the persons "you are associated with in this activity that you have described." Appellant is then assured (R 111) by Mr. Doyle that he has waived his privilege and a discussion ensued between appellant and Mr. Doyle on whether or not appellant

has been trapped and appellant is assured again that there is no way in which he can incriminate himself by answering Mr. Doyle's question "But what is the name of the group" which constitutes Count IX. Finally Mr. Doyle concludes with the question which constitutes Count X "Does the group you refer to have an office with you in that same office?" There can be no doubt but that the questions in Counts IX and X are related in context with dismissed Count VII.

Appellee goes so far as to say that appellant should have answered that his profession was one of "earning money" (Br. 10) instead of having given the full answer which appellant did give (R 108). Appellee overlooks that appellant's full answer contained no incriminating matter and he therefore had the right to "stop short." Appellee does not meet the issue of stopping short.

Appellee's Brief: Page 10—Tend to Incriminate.

Appellee quarrels with the use of the word "variance" because appellant suggested the possibility of being exposed to perjury if appellant's testimony was at variance with the testimony of others. Appellee says appellant does not suggest one instance in the entire record where "there is or may be a variance." The point is precisely that appellant declined to answer because of apprehension of variance and ensuing possibility of perjury so that of course the record does

not show the variance. We refer to Appellant's Brief page 47-48 on counsel for the Committee's invitation to such difficulties. *U. S. vs. Moran* 194 F 2nd 623 (CA 2 1952) cited by appellee for a different purpose, was an appeal from a perjury conviction arising out of testimony before a Senate Crime Investigating Committee.

Appellee's Brief: Page 13—Pertinency of Questions.

Although in *Bowers vs. United States*, 202 F. 2nd 447 (CA DC) the defendant was acquitted because the United States had not sustained the burden of proof in establishing the pertinency of a question which the witness had declined to answer, appellee cites the case as stating that if the context of the question is plainly pertinent, then the burden is ipso facto satisfied. But the Court also stated: ". . . the question and answer for which it called, standing alone, did not pertain to the subject under inquiry . . ."

As to Counts VIII, IX and X, appellee (Br. 15) cites Mr. Tavenner as stating "the purpose was of ascertaining facts relating to the man's identity and the business in which he was then engaged." However, the Committee had earlier in the hearings (R 83-84, 87, 108) received the answers to satisfy said purpose; but the Committee (Appellant's Br. 24-30, 54-56) continued to reword questions to further harrass and entrap the appellant into waiver.

> ". . . It may often be proper, justifiable and helpful in the accomplishment of its investigative purposes for a Congressional Committee to address to witnesses questions which it can not demonstrate to be pertinent. But in branding a refusal to answer as a misdemeanor, Congress was careful to provide that the question must be 'pertinent to the question under inquiry'. It follows that when a witness refuses to answer a question and the Government undertakes to convict him of a criminal offense for not answering, the pertinency must be established. A presumption of pertinency will not suffice." *Bowers vs. U.S.,* supra, Page 448.

U. S. vs. Orman 207 F. 2nd 148 (CA 3), is cited by appellee (Br. 16). This case, however, held that an offer during the trial to show that the answer would have been innocent did not destroy the pertinency of the question. Appellant does not quarrel with this holding. Rather the point is that the questions represented by Counts IX and X are not anywhere shown to be pertinent, although in context they could be incriminating to answer, leading back as they did, to Count VII, and other interspersed questions on communism. (See this brief, pages 5, 6) In addition and differing from the *Orman* case the Committee already had the answers in its record (Appellant's Br. 66).

Appellee cites (Br. 16) *United States vs. Josephson,* 165 F. 2d 82 (CA 2) (1948), which appellant does not feel is applicable because in that case the defendant refused to even be sworn and to testify, claiming that his rights under the First Amendment were being vio-

lated; under those particular facts the Court held that the authorizing statute contains the declaration of Congress that the information sought was for a legislative purpose. In the instant case appellant testified freely as to a great many matters and the trial court held that appellant intended to cooperate as fully as he could (R 192).

Appellee does not distinguish between stating the general purpose of the investigation, which appellant concedes, from the matter of the pertinency of particular questions asked or the answers sought.

Appellee's brief avoids discussion of the basic general points in Specification of Error No. 1, argued in appellant's brief, page 16. These points (unfair hearing; lack of due process) are crucial to the protection of appellant from the unconstitutional acts on the part of this Legislative Committee and should be thoroughly considered by the court.

Respectfully submitted,

ARTHUR G. BARNETT,
Attorney for Appellant

No. 14749

United States
Court of Appeals
for the Ninth Circuit

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION,

Appellants,

vs.

LONDON EVANS, Administrator of the Estate of GENERAL GRANT GREER, JR., Deceased,

Appellee.

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION,

Appellants,

vs.

LONDON EVANS, Administrator of the Estate of RUBBY GREER, Deceased,

Appellee.

Transcript of Record

Appeals from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-5-55

No. 14749

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer, Civil 1921 Phx.	12
Answer, Civil 1922 Phx.	14
Attorneys of Record	1
Clerk's Certificate to Record on Appeal	146
Complaint, Civil 1921 Phx.	3
Complaint, Civil 1922 Phx.	6
Findings of Fact and Conclusions of Law, Civil 1921 Phx.	18
Findings of Fact and Conclusions of Law, Civil 1922 Phx.	22
Judgment, Civil 1921 Phx.	26
Judgment, Civil 1922 Phx.	27
Minute Entry, September 21, 1953—Granting Defendants' Motion to Strike	11
Minute Entry, February 10, 1954—Order on Stipulation, Waiving Jury Trial	17
Minute Entry, February 21, 1955—Order That Motion for New Trial Be Considered as a Motion to Set Aside Findings of Fact, Conclusions of Law, Judgment and to Enter Judgment for Defendants, Etc.—Order Denied	38

INDEX PAGE

Motion for New Trial, Civil 1921 Phx., and Civil 1922 Phx. 37

Motion to Strike, Civil 1921 Phx. 9

Motion to Strike, Civil 1922 Phx. 10

Notice of Appeal, Civil 1921 Phx. 39

Notice of Appeal, Civil 1922 Phx. 39

Objections and Exceptions to Findings of Fact and Conclusions of Law and Judgment, Civil 1921 Phx. 28

Objections and Exceptions to Findings of Fact and Conclusions of Law and Judgment, Civil 1922 Phx. 33

Order Extending Time to File Record on Appeal 45

Order for Judgment 17

Statement of Points (U.S.D.C.) 40

Statement of Points (U.S.C.A.) 151

Stipulation Consolidating Cases on Appeal ... 44

Transcript of Proceedings 46

Witnesses, Defendants':

Cochran, Louis O.

—direct 123

—cross 126

Mendenhall, Wilfred T.

—direct 127

—cross 132

INDEX PAGE

Witnesses, Defendants'—(Cont.):

Nation, J. W. Orby

—direct 133

—cross 140

—redirect 143

Witnesses, Plaintiff's:

Cochran, Louis O.

—direct 48

—cross 68

—redirect 78, 83, 86

—recross 80, 84

Evans, London

—direct 109

—cross 118

Nation, J. W. Orby

—direct 87, 103

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In the United States District Court for the District of Arizona

No. Civ.-1921—Phx.

LONDON EVANS, Administrator of the Estate of General Grant Greer, Jr., Deceased,

Plaintiff,

vs.

GRIFFEN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

COMPLAINT

Comes now the plaintiff, through C. Ray Robinson, Thomas L. Berkley, and Neil C. Clark, his attorneys, and for cause of action against the defendants, and each of them, alleges the following:

I.

That the plaintiff is a citizen of the State of California and is the duly appointed, qualified and acting Administrator of the estate of General Grant Greer, deceased.

That the defendant Griffen Buick, Inc., is an Arizona corporation with its principal place of business in the City and County of Yuma, Arizona; that the defendant J. W. Nation is a citizen of the State of Arizona and a resident of the County of Yuma in said state.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

That at all times hereinafter mentioned, the defendant Nation was an employee of the defendant Griffen Buick, Inc., and acting in the regular scope of his employment for the said defendant Griffen Buick, Inc.

II.

That prior to December 23, 1952, the plaintiff's intestate, General Grant Greer, was a resident of the State of California and of the County of Contra Costa; that he was a married person and that the name of his wife was Rubby Greer.

III.

That on or about December 23, 1952, at the hour of 10:30 o'clock p.m., the plaintiff's intestate was operating a motor vehicle in the State of Arizona, County of Yuma, and proceeding in a westerly direction on public highway U. S. No. 80 at a point approximately 18 miles East of the City of Yuma in said county and state, in a careful and prudent manner and with due regard for the safety of others who were then and there on the highway; that at said time and place the defendant J. W. Nation, an employee and agent of and acting in the course of his said employment for the defendant, Griffin Buick, Inc., was in possession of and operating one certain 1952 GMC Wrecker Tow Car owned and used by the defendant Griffen Buick, Inc.; the said defendant Nation, as such employee, negligently, wilfully, recklessly and wantonly placed and caused

said Tow Car to be placed on said highway in such a position and location as to imperil the lives and property of persons traveling in automobiles on said highway, and as a direct and proximate result of the negligent, reckless and wanton operation and placing of the said Tow Car by the defendant Nation, the automobile of plaintiff's intestate collided with the said Tow Car and a trailer to which said Tow Car was attached, and as a result of said collision, plaintiff's intestate suffered and sustained injuries from which he then and there died.

IV.

That at the time of his death plaintiff's intestate was a male of 31 years, in good and vigorous health and with a life expectancy of forty years; that he was gainfully employed and earning approximately $3,600.00 per year; that as a direct and proximate result of the above-mentioned negligent, reckless, wilfull and wanton conduct of the defendant Nation and the ensuing death of plaintiff's intestate, the estate of said plaintiff's intestate was diminished, depleted and damaged in the sum of $200,000.00.

That the burial costs of plaintiff's decedent, incurred as the result of his wrongful death, amounted to $687.50, thereby causing an additional loss to decedent's estate of $687.50.

Wherefore, plaintiff prays judgment against the defendants, and each of them, for the sum of $200,687.50, and for costs incurred herein, and for such

other and further relief as the Court shall deem meet and proper.

C. RAY ROBINSON,

THOMAS L. BERKLEY,

CLARK & CLARK,

By /s/ C. RAY ROBINSON,
Attorneys for Plaintiff.

[Endorsed]: Filed August 13, 1953.

In the United States District Court for the District of Arizona

No. Civ-1922—Phx.

LONDON EVANS, Administrator of the Estate of Rubby Greer, Deceased,

Plaintiff,

vs.

GRIFFEN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

COMPLAINT

Comes now the plaintiff, through C. Ray Robinson, Thomas L. Berkley, and Neil C. Clark, his attorneys, and for cause of action against the defendants, and each of them, alleges the following:

I.

That the plaintiff is a citizen of the State of California and is the duly appointed, qualified and act-

ing Administrator of the estate of Rubby Greer, deceased.

That the defendant Griffen Buick, Inc., is an Arizona corporation with its principal place of business in the City and County of Yuma, Arizona; that the defendant J. W. Nation is a citizen of the State of Arizona and a resident of the County of Yuma in said state.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

That at all times hereinafter mentioned, the defendant Nation was an employee of the defendant Griffen Buick, Inc., and acting in the regular scope of his employment for the said defendant Griffen Buick, Inc.

II.

That prior to December 23, 1952, the plaintiff's intestate, Rubby Greer, was a resident of the State of California and of the County of Contra Costa; that she was a married person and that the name of her husband was General Grant Greer.

III.

That on or about December 23, 1952, at the hour of 10:30 o'clock p.m., the plaintiff's intestate was riding in a motor vehicle in the State of Arizona, County of Yuma, and which was proceeding in a westerly direction on public highway U. S. No. 80 at a point approximately 18 miles East of the City of Yuma in said county and state, in a careful and prudent manner and with due regard for the safety

of others who were then and there on the highway; that at said time and place the defendant J. W. Nation, an employee and agent of and acting in the course of his said employment for the defendant, Griffin Buick, Inc., was in possession of and operating one certain 1952 GMC Recker Tow Car owned and used by the defendant Griffen Buick, Inc.; the said defendant Nation, as such employee, negligently, wilfully, recklessly and wantonly placed and caused said Tow Car to be placed on said highway in such a position and location as to imperil the lives and property of persons traveling in autmobiles on said highway, and as a direct and proximate result of the negligent, reckless and wanton operation and placing of the said Tow Car by the defendant Nation, the automobile in which plaintiff's intestate was riding collided with the said Tow Car and a trailer to which said Tow Car was attached, and as a result of said collision, plaintiff's intestate suffered and sustained injuries from which she then and there died.

IV.

That at the time of her death plaintiff's intestate was a female of 32 years, in good and vigorous health and with a life expectancy of 39 years; that she cared for the seven minor children of herself and her said husband and maintained and kept the home of herself and her said husband and did all of the housework therein; that as direct and proximate result of the above-mentioned negligent, reckless, wilful and wanton conduct of the defendant Nation and the ensuing death of plaintiff's intestate, the

estate of said plaintiff's intestate was diminished, depleted and damaged in the sum of $100,000.00.

That the burial costs of plaintiff's decedent, incurred as the result of her wrongful death, amounted to $718.00, thereby causing an additional loss to decedent's estate of $718.00.

Wherefore, plaintiff prays judgment against the defendants, and each of them, for the sum of $100,718.00, and for costs incurred herein, and for such other and further relief as the Court shall deem meet and proper.

C. RAY ROBINSON,

THOMAS L. BERKLEY,

CLARK & CLARK,

By /s/ C. RAY ROBINSON,
Attorneys for Plaintiff.

[Endorsed]: Filed August 13, 1953.

[Title of District Court and Cause.]

No. 1921

MOTION TO STRIKE

Come Now the defendants, by and through their attorneys, Gust, Rosenfeld, Divelbess & Robinette, by James F. Henderson, and move the Court for an order striking from plaintiff's complaint that

part of said complaint set forth at page 3 thereof as a part of paragraph IV, which states as follows:

> "That the burial costs of plaintiff's decedent, incurred as the result of his wrongful death, amounted to $687.50, thereby causing an additional loss to decedent's estate of $687.50."

together with that part of plaintiff's prayer which prays for the said sum of $687.50.

GUST ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants.

[Endorsed]: Filed August 31, 1953.

[Title of District Court and Cause.]

No. 1922

MOTION TO STRIKE

Come Now the defendants, by and through their attorneys, Gust, Rosenfeld, Divelbess & Robinette, by James F. Henderson, and move the Court for an order striking from plaintiff's complaint that part of said complaint set forth at page 3 thereof as a part of paragraph IV, which states as follows:

> "That the burial costs of plaintiff's decedent, incurred as the result of her wrongful death, amounted to $718.00, thereby causing an additional loss to decedent's estate of $718.00."

together with that part of plaintiff's prayer which prays for the said sum of $718.00.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants.

[Endorsed]: Filed August 31, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF SEPTEMBER 21, 1953

Honorable Dave W. Ling, United States District Judge, Presiding.

Nos. 1921 and 1922

Defendants' Motion for Security for Costs and Motion to Strike come on regularly for hearing this day. Neil Clark, Esq., is present for the Plaintiff and James Henderson, Esq., is present for the defendants. On stipulation of counsel,

It Is Ordered that said Motion for Security for Costs is granted and that the plaintiff is allowed 30 days to file cost bond in the sum of $250.00, and

It Is Further Ordered that Defendants' Motion to Strike is granted.

[Title of District Court and Cause.]

No. Civ. 1921 Phx.

ANSWER

Come Now the defendants and for answer to plaintiff's complaint, admit, deny and allege:

I.

That defendants are without information or knowledge sufficient upon which to form a belief as to whether or not the plaintiff is a citizen of the State of California and is the duly appointed, qualified and acting administrator of the Estate of General Grant Greer, deceased, and therefore denies such allegations.

Admit the remaining allegations contained in paragraph I of plaintiff's complaint.

II.

These defendants are without information or knowledge sufficient upon which to form a belief as to the truth of the allegations contained in paragraph II of plaintiff's complaint and therefore deny each and every such allegation.

III.

Admit that on or about December 23, 1952, at about 10:30 o'clock p.m. plaintiff's intestate was operating a motor vehicle in the State of Arizona, County of Yuma, in a westerly direction on U. S. Highway No. 80, at a point approximately 18 miles

east of the City of Yuma; that at said time and place defendant J. W. Nation was an employee and agent of and acting in the course of his said employment for the defendant Griffen Buick, Inc., and that said J. W. Nation was operating a certain 1952 GMC wrecker tow car owned by defendant Griffen Buick, Inc.; that the automobile of plaintiff's intestate collided with the said tow car and a trailer.

Deny each and every, all and singular, the remaining allegations contained in paragraph III of plaintiff's complaint not specifically admitted herein.

IV.

These defendants are without information or knowledge sufficient upon which to form a belief as to the truth of the allegations contained in paragraph IV of plaintiff's complaint and therefore deny each and every such allegation.

V.

For a further and separate answer to plaintiff's complaint, defendants allege that said complaint fails to state a claim upon which relief can be granted.

VI.

For a further and separate answer to plaintiff's complaint, defendants allege that if the plaintiff's intestate, General Grant Greer, Jr., or the Estate of General Grant Greer, Jr., was injured or damaged in any respect whatsoever as a result of said collision, that said injuries or damages were solely

caused or contributed to by the gross and wanton negligence of General Grant Greer, Jr.

Wherefore, having fully answered plaintiff's complaint, defendants pray that said complaint be dismissed, and for their costs herein incurred, and for such other and further relief as to the Court may seem just.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1953.

[Title of District Court and Cause.]

No. Civ. 1922 Phx.

ANSWER

Come Now the defendants and for answer to plaintiff's complaint, admit, deny and allege:

I.

That defendants are without information or knowledge sufficient upon which to form a belief as to whether or not the plaintiff is a citizen of the State of California and is the duly appointed, qualified and acting administrator of the Estate of Rubby Greer, deceased, and therefore denies such allegations.

Admit the remaining allegations contained in paragraph I of plaintiff's complaint.

II.

These defendants are without information or knowledge sufficient upon which to form a belief as to the truth of the allegations contained in paragraph II of plaintiff's complaint and therefore deny each and every such allegation.

III.

Admit that on or about December 23, 1952, at about 10:30 o'clock p.m., plaintiff's intestate was riding as a passenger in a motor vehicle in the State of Arizona, County of Yuma, which was proceeding in a westerly direction on U. S. Highway No. 80, at a point approximately 18 miles east of the City of Yuma; that at said time and place defendant J. W. Nation was an employee and agent of and acting in the course of his said employment for the defendant Griffen Buick, Inc., and that said J. W. Nation was operating a certain 1952 GMC wrecker tow car owned by defendant Griffen Buick, Inc.; that the automobile in which plaintiff's intestate was riding collided with the said tow car and a trailer.

Deny each and every, all and singular, the remaining allegations contained in paragraph III of plaintiff's complaint not specifically admitted herein.

IV.

These defendants are without information or

knowledge sufficient upon which to form a belief as to the truth of the allegations contained in paragraph IV of plaintiff's complaint and therefore deny each and every such allegation.

V.

For a further and separate answer to plaintiff's complaint, defendants allege that said complaint fails to state a claim upon which relief can be granted.

VI.

For a further and separate answer to plaintiff's complaint, defendants allege that if plaintiff's intestate or the Estate of Rubby Grant, or either of them, were injured or damaged in said collision, that said injuries or damages were solely caused or contributed to by the gross and wanton negligence of General Grant Greer, Jr.

Wherefore, having fully answered plaintiff's complaint, defendants pray that said complaint be dismissed, and for their costs herein incurred, and for such other and further relief as to the Court may seem just.

GUST, ROSENFELD,
DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF FEBRUARY 10, 1954

Nos. 1921 and 1922

Honorable Dave W. Ling, United States District Judge, Presiding.

Ronald Webster, Jr., Esq., is present for the plaintiff. James Henderson, Esq., is present for the defendants. On stipulation of counsel,

It Is Ordered that the record show that a jury is waived herein and that this case be tried before the court without a jury.

[Title of District Court and Cause.]

Nos. 1921 and 1922

ORDER FOR JUDGMENT

It Is Ordered that plaintiff, London Evans, Administrator of the Estate of Rubby Greer, deceased, have and recover of defendants, Griffen Buick, Inc., an Arizona Corporation, and J. W. Nation, the sum of ten thousand ($10,000.00) Dollars.

It Is Ordered that plaintiff, London Evans, Administrator of the Estate of General Grant Greer, Jr., deceased, have and recover of defendants, Griffen Buick, Inc., an Arizona Corporation, and J. W. Nation, the sum of fifteen thousand ($15,000.00) Dollars.

Dated: August 24, 1954, at Portland, Oregon.

/s/ DAVE W. LING,
U. S. District Judge.

[Endorsed]: Filed and docketed August 27, 1954.

[Title of District Court and Cause.]

No. Civ. 1921 Phx.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having regularly come on for trial on February 12, 1954, at Phoenix, Arizona, before the Honorable David W. Ling, the plaintiff being represented by Clark & Clark, Law Offices of Thomas L. Berkley and Law Offices of C. Ray Robinson, by R. A. McCormick, and the defendants being represented by Gust, Rosenfeld, Divelbess & Robinette, by James F. Henderson, and the Court having received evidence, both written and oral, and being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

The plaintiff is a citizen of the State of California and is the duly appointed, qualified and acting Administrator of the Estate of General Grant Greer, Jr., deceased. The defendant, Griffen Buick, Inc., is an Arizona corporation with its principal place of business in the County of Yuma, Arizona.

The defendant, J. W. Nation, is a citizen of the State of Arizona and a resident of the County of Yuma in said state. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

At all times herein mentioned, the defendant J. W. Nation, was an employee of the defendant, Griffen Buick, Inc., and was then and there acting within the course and scope of his said employment.

III.

Prior to December 23, 1952, the plaintiff's intestate, General Grant Greer, Jr., was a resident of the County of Contra Costa in the State of California. He was a married person and the name of his wife was Rubby Greer.

IV.

On December 23, 1952, the plaintiff's intestate was operating a motor vehicle in the County of Yuma, State of Arizona, and was proceeding in a westerly direction on public highway U. S. No. 80 at a point approximately eighteen miles east of the City of Yuma in said county and state. At said time and place the plaintiff's intestate was operating said motor vehicle in a careful and prudent manner and with due regard for the safety of others on the highway. At said time and place the defendant, J. W. Nation, was in possession of and controlled, maintained and operated a certain 1952 GMC wrecker tow car which was then and there owned by the defendant, Griffin Buick, Inc. At said time and

place said defendant Nation wantonly and wilfully placed said tow car and caused said tow car to be placed on said highway in such a position and location as to imperil the lives and property of persons traveling in motor vehicles on said highway, and said defendant Nation wilfully and wantonly failed and neglected to give and place suitable warnings of the position and location of said tow car, and said defendant Nation recklessly and negligently operated, maintained and controlled said tow car. As a direct and proximate result of said wilful and wanton misconduct and of said recklessness and negligence of the defendant Nation, the automobile driven by plaintiff's intestate collided with said tow car and with a trailer to which said tow car was attached, and as a direct and proximate result of said collision, plaintiff's intestate suffered and sustained injuries from which he then and there died.

V.

At the time of his said death plaintiff's intestate was a male of thirty-one years, he was in good and vigorous health, he had a life expectancy of approximately forty years, he was gainfully employed, and he was earning approximately $3,600.00 per year. As a direct and proximate result of said wilful and wanton misconduct and of said recklessness and negligence on the part of defendant Nation and of the said death of plaintiff's intestate the estate of plaintiff's intestate was diminished, depleted and damaged in the sum of Fifteen Thousand Dollars ($15,000.00).

VI.

The sole proximate cause of said collision and of said death and of said damage was the said wilful and wanton misconduct and said recklessness and negligence of said defendant Nation. At the time and place aforesaid the plaintiff's intestate was not guilty of any negligence or want of care which contributed as a proximate cause of said collision or of said death or of said damages.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Conclusions of Law

I.

This Court had jurisdiction of the subject matter and of the parties.

II.

The plaintiff is entitled to judgment against the defendants, Griffin Buick, Inc., and J. W. Nation, jointly and severally, in the sum of Fifteen Thousand Dollars ($15,000.00), together with his costs and disbursements herein.

Let Judgment Be Entered Accordingly.

Dated: October 18, 1954.

/s/ DAVID W. LING,
Chief Judge, United States
District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

No. Civ. 1922 Phx.

FINDING OF FACT AND CONCLUSIONS OF LAW

This matter having regularly come on for trial on February 12, 1954, at Phoenix, Arizona, before the Honorable David W. Ling, the plaintiff being represented by Clark & Clark, Law Offices of Thomas L. Berkley and Law Offices of C. Ray Robinson, by R. A. McCormick, and the defendants being represented by Gust, Rosenfeld, Divelbess & Robinette, by James F. Henderson, and the Court having received evidence, both written and oral, and being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

The plaintiff is a citizen of the State of California and is the duly appointed, qualified and acting Administrator of the Estate of Rubby Greer, deceased. The defendant, Griffin Buick, Inc., is an Arizona corporation with its principal place of business in the County of Yuma, Arizona. The defendant, J. W. Nation, is a citizen of the State of Arizona and a resident of the County of Yuma in said state. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

At all times herein mentioned the defendant, J. W. Nation, was an employee of the defendant, Griffin Buick, Inc., and was then and there acting within the course and scope of his said employment.

III.

Prior to December 23, 1952, the plaintiff's intestate, Rubby Greer, was a resident of the County of Contra Costa in the State of California. She was a married person and the name of her husband was General Grant Greer, Jr.

IV.

On December 23, 1952, the plaintiff's intestate was riding in a motor vehicle in the County of Yuma, State of Arizona, and was proceeding in a westerly direction on public highway U. S. No. 80 at a point approximately eighteen miles east of the city of Yuma in said County and State. At said time and place said motor vehicle was being operated in a careful and prudent manner and with due regard for the safety of others on the highway. At said time and place the defendant, J. W. Nation, was in possession of and controlled, maintained and operated a certain 1952 GMC wrecker tow car which was then and there owned by the defendant Griffin Buick, Inc. At said time and place said defendant Nation wantonly and wilfully placed said tow car and caused said tow car to be placed on said highway in such a position and location as to imperil the lives and property of

persons traveling in motor vehicles on said highway, and said defendant Nation wilfully and wantonly failed and neglected to give and place suitable warnings of the position and location of said tow car, and said defendant Nation recklessly and negligently operated, maintained and controlled said tow car. As a direct and proximate result of said wilful and wanton misconduct and of said recklessness and negligence of the defendant Nation, the automobile in which plaintiff's intestate was riding collided with said tow car and with a trailer to which said tow car was attached, and as a direct and proximate result of said collision, plaintiff's intestate suffered and sustained injuries from which she then and there died.

V.

At the time of her said death, plaintiff's intestate was a female of thirty-two years, she was in good and vigorous health, she had a life expectancy of approximately thirty-nine years, she cared for the seven minor children of herself and her husband, and she maintained and kept the home of herself and her husband and did all the housework therein. As a direct and proximate result of said wilful and wanton misconduct and of said recklessness and negligence on the part of defendant Nation and of the said death of plaintiff's intestate, the estate of plaintiff's intestate was diminished, depleted and damaged in the sum of Ten Thousand Dollars ($10,000.00).

VI.

The sole proximate cause of said collision and of said death and of said damage was the said wilful and wanton misconduct and said recklessness and negligence of said defendant Nation. At the time and place aforesaid, the plaintiff's intestate was not guilty of any negligence or want of care which contributed as a proximate cause of said collision or of said death or of said damages.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Conclusions of Law

I.

This Court had jurisdiction of the subject matter and of the parties.

II.

The plaintiff is entitled to judgment against the defendants, Griffin Buick, Inc., and J. W. Nation, jointly and severally, in the sum of Ten Thousand Dollars ($10,000.00), together with his costs and disbursements herein.

Let Judgment Be Entered Accordingly.

Dated: October 18, 1954.

/s/ DAVID W. LING,
Chief Judge, United States
District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed October 18, 1954.

In the United States District Court for the District of Arizona

No. Civ. 1921 Phx.

LONDON EVANS, Administrator of the Estate of General Grant Greer, Jr., Deceased,

Plaintiff,

vs.

GRIFFIN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

JUDGMENT

This matter having regularly come on for trial on February 12, 1954, at Phoenix, Arizona, before the Honorable David W. Ling, the plaintiff being represented by Clark & Clark, Law Offices of Thomas L. Berkley and Law Offices of C. Ray Robinson, by R. A. McCormick, and the defendants being represented by Gust, Rosenfeld, Divelbess & Robinette, by James F. Henderson, and the Court having received evidence, both written and oral, and being fully satisfied in the premises and having made its Findings of Fact and Conclusions of Law herein,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendants, Griffin Buick, Inc., and J. W. Nation, the sum of Fifteen Thousand Dollars ($15,000.00) together with his costs and disbursements incurred herein, taxed at $212.50.

Dated: October 18, 1954.

/s/ DAVID W. LING,
Chief Judge, United States
District Court.

Receipt of copy acknowledged.

Lodged September 9, 1954.

[Endorsed]: Filed and docketed October 18, 1954.

In the United States District Court for the
District of Arizona

No. Civ. 1922 Phx.

LONDON EVANS, Administrator of the Estate of Rubby Greer, Deceased,

Plaintiff,

vs.

GRIFFIN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

JUDGMENT

This matter having regularly come on for trial on February 12, 1954, at Phoenix, Arizona, before the Honorable David W. Ling, the plaintiff being represented by Clark & Clark, Law Offices of Thomas L. Berkley and Law Offices of C. Ray Robinson, by R. A. McCormick, and the defendants being represented by Gust, Rosenfeld, Divelbess &

Robinette, by James F. Henderson, and the Court having received evidence, both written and oral, and being fully satisfied in the premises, and having made its Findings of Fact and Conclusions of Law herein,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendants, Griffin Buick, Inc., and J. W. Nation, the sum of Ten Thousand Dollars ($10,000.00), together with his costs and disbursements incurred herein, taxed at $39.00.

Dated: October 18, 1954.

/s/ DAVID W. LING,
Chief Judge, United States
District Court.

Receipt of copy acknowledged.

Lodged September 9, 1954.

[Endorsed]: Filed and docketed October 18, 1954.

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Defendants, Griffin Buick, Inc., and J. W. Nation, object and except to the findings of fact and

conclusions of law and judgment as submitted by the Plaintiff and entered by the Court in the above-entitled cause on October 18, 1954, for the following reasons:

I.

Object and except to the findings of fact contained in Paragraph IV on the grounds and for the reasons that there was no evidence as to whether Plaintiff's Intestate was a passenger therein, or was operating Plaintiff's motor vehicle; there was no evidence whatsoever that Plaintiff's Intestate was operating said motor vehicle in a careful and prudent manner and with due regard for the safety of others on the highway, but that uncontroverted evidence clearly showed that said automobile was being operated at a high and excessive speed for the conditions then and there existing, and in excess of the legal, posted speed limit; that the uncontroverted evidence showed that Defendant Nation, while occupying the north half of the highway, and facing oncoming traffic, did so in compliance with the laws of the State of Arizona which require that to so occupy such part of a highway, that at least the opposite one-half should remain free and clear; and that Defendant, Nation, also complied with the further law of the State of Arizona in placing reflectors and flares at a distance from the disabled equipment which gave an even greater margin of warning than was required by statute; that the uncontroverted evidence showed that Defendant's tow truck was not placed on the highway in such a position and location as to im-

peril the lives and property of persons traveling in motor vehicles on said highway, but rather the uncontroverted evidence showed that other vehicles properly using the highway were not endangered, but were warned by the warning flares placed by Defendant Nation so as to safely pass the disabled equipment; that Defendant Nation did not fail and neglect to place suitable warning of the position and location of the tow car, but rather that the evidence clearly shows that such warnings were put in place by Defendant Nation and that they gave an even greater margin of notice than even the statute required; that the evidence showed Defendant Nation carefully, properly and lawfully operated, maintained and controlled the tow car, in compliance with the laws relating to such operation and control, and that neither was his action careless, reckless or negligent, nor that the action of said Defendant were the proximate cause of the resulting collision and the death of Plaintiff's Intestate which thereupon occurred.

II.

Object and except to findings of fact contained in Paragraph V, on the grounds and for the reason that there was no evidence that established the earning capacity of Plaintiff's Intestate, or that Plaintiff's Intestate's Estate was diminished, depleted and damaged in the sum of Fifteen Thousand ($15,000.00) Dollars, or any sum, as a result of the death of said Plaintiff's Intestate.

III.

Object and except to findings of fact contained

in Paragraph VI on the grounds and for the reason that there was no evidence proving or tending to prove that the sole proximate cause of said collision was due to any act or action on the part of Defendant Nation; and on the further ground that the uncontroverted evidence showed that the car occupied by Plaintiff's Intestate was traveling at an excessive speed in view of the conditions then and there existing, and was not traveling at a properly reduced rate of speed while approaching the crest of a hill, and was traveling at a speed in excess of the legal and posted speed limit then and there existing, and was not under such control that it could be brought to a stop or maneuvered to safely avoid other automobiles or persons lawfully using the highway, and that such action on the part of the driver of the automobile of Plaintiff's Intestate, was the sole and proximate cause of said collision, or at least a contributing cause.

IV.

Objects and excepts to conclusion of law No. II, on the grounds and for the reason that said conclusion is contrary to the evidence and contrary to the law.

V.

Objects and excepts to the judgment of the court entered herein on the grounds and for the reasons that it is contrary to the evidence and to the law.

VI.

Objects and excepts to the court's failure to make proposed amended findings of fact, Nos. IV through

XXXI, inclusive, as submitted by the Defendants, Griffin Buick, Inc., and J. W. Nation; and further objects and excepts to the Court's failure to make proposed amended conclusion of law No. II as submitted by Defendants Griffin Buick, Inc., and J. W. Nation, and to the court's failure to enter judgment in the form submitted by Defendants Griffin Buick, Inc., and J. W. Nation on the grounds and for the reasons that said findings of fact, conclusions of law, and judgment were supported by the uncontroverted testimony and the law, which clearly showed that Defendant J. W. Nation acted carefully and prudently and in conformance with all of his statutory duties while the driver of the automobile which was occupied by Plaintiff's Intestate, was negligent in the respects hereinbefore set forth and that such negligence was the sole or contributing cause of the collision which resulted in the death of Plaintiff's Intestate.

Respectfully submitted,

GUEST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,

Attorneys for Defendants, Griffin Buick, Inc., a Corp., and J. W. Nation.

Affidavit of mailing attached.

[Endorsed]: Filed October 19, 1954.

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Defendants, Griffin Buick, Inc., and J. W. Nation, object and except to the findings of fact and conclusions of law and judgment as submitted by the Plaintiff and entered by the Court in the above-entitled cause on October 18, 1954, for the following reasons:

I.

Object and except to the findings of fact contained in Paragraph IV on the grounds and for the reasons that there was no evidence as to whether Plaintiff's Intestate was a passenger therein, or was operating Plaintiff's motor vehicle; there was no evidence whatsoever that said motor vehicle was operated in a careful and prudent manner and with due regard for the safety of others on the highway, but that uncontroverted evidence clearly showed that said automobile was being operated at a high and excessive speed for the conditions then and there existing, and in excess of the legal, posted speed limit; that the uncontroverted evidence showed that Defendant Nation, while occupying the north half of the highway, and facing oncoming traffic, did so in compliance with the laws of the State of Arizona which require that to so occupy such part of a highway, that at least the opposite one-half should remain free and clear; and that Defendant Nation also complied with the further

law of the State of Arizona in placing reflectors and flares at a distance from the disabled equipment which gave an even greater margin of warning than was required by statute; that the uncontroverted evidence showed that Defendant's tow truck was not placed on the highway in such a position and location as to imperil the lives and property of persons traveling in motor vehicles on said highway, but rather the uncontroverted evidence showed that other vehicles properly using the highway were not endangered, but were warned by the warning flares placed by Defendant Nation so as to safely pass the disabled equipment; that Defendant Nation did not fail and neglect to place suitable warning of the position and location of the tow car, but rather that the evidence clearly shows that such warnings were put in place by Defendant Nation and that they gave an even greater margin of notice than even the statute required; that the evidence showed Defendant Nation carefully, properly and lawfully operated, maintained and controlled the tow car, in compliance with the laws relating to such operation and control, and that neither was his action careless, reckless or negligent, nor that the actions of said Defendant were the proximate cause of the resulting collision and the death of Plaintiff's Intestate which thereupon occurred.

II.

Object and except to findings of fact contained in Paragraph V, on the grounds and for the reason that there was no evidence that Plaintiff's Intestate's Estate was diminished, depleted and damaged in the sum of Ten Thousand ($10,000.00)

Dollars, or any sum, as a result of the death of said Plaintiff's Intestate.

III.

Object and except to findings of fact contained in Paragraph VI, on the grounds and for the reason that there was no evidence proving or tending to prove that the sole proximate cause of said collision was due to any act or action on the part of Defendant Nation, and on the further ground that the uncontroverted evidence showed that the car occupied by Plaintiff's Intestate was traveling at an excessive speed in view of the conditions then and there existing, and was not traveling at a properly reduced rate of speed while approaching the crest of a hill, and was traveling at a speed in excess of the legal and posted speed limit then and there existing, and was not under such control that it could be brought to a stop or maneuvered to safely avoid other automobiles or persons lawfully using the highway, and that such action on the part of the driver of the automobile of Plaintiff's Intestate, was the sole and proximate cause of said collision, or at least a contributing cause.

IV.

Objects and excepts to conclusion of law No. II on the grounds and for the reason that said conclusion is contrary to the evidence and contrary to the law.

V.

Objects and excepts to the judgment of the court entered herein on the grounds and for the reasons that it is contrary to the evidence and to the law.

VI.

Objects and excepts to the court's failure to make proposed amended findings of fact, Nos. IV through XXXI, inclusive, as submitted by the Defendants, Griffin Buick, Inc., and J. W. Nation, and further objects and excepts to the Court's failure to make proposed amended conclusion of law No. II, as submitted by Defendants Griffin Buick, Inc., and J. W. Nation, and to the court's failure to enter judgment in the form submitted by Defendants Griffin Buick, Inc., and J. W. Nation, on the grounds and for the reasons that said findings of fact, conclusions of law, and judgment were supported by the uncontroverted testimony and the law, which clearly showed that Defendant J. W. Nation acted carefully and prudently and in conformance with all of his statutory duties while the driver of the automobile which was occupied by Plaintiff's Intestate was negligent in the respects hereinbefore set forth and that such negligence was the sole or contributing cause of the collision which resulted in the death of Plaintiff's Intestate.

Respectfully submitted,

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,

Attorneys for Defendants, Griffin Buick, Inc., a Corp., and J. W. Nation.

Affidavit of mailing attached.

[Endorsed]: Filed October 19, 1954.

[Title of District Court and Cause.]

Nos. 1921 and 1922

MOTION FOR NEW TRIAL

Come now Defendants and move the Court for an Order setting aside and vacating the findings of fact, conclusions of law and judgment rendered and entered in the above-entitled case in favor of the Plaintiff and against the Defendants, and granting the Defendants a new trial for the following reasons and upon the following grounds:

1. That the findings of fact are not justified by the evidence;
2. That the conclusions of law are not justified by the evidence;
3. That the judgment is not justified by the evidence;
4. That the findings of fact are contrary to the evidence;
5. That the conclusions of law are contrary to the evidence;
6. That the conclusions of law are contrary to the law;
7. That the judgment is contrary to the law.

Dated this 26th day of October, 1954.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

Nos. 1921 and 1922

MINUTE ENTRY OF FEBRUARY 21, 1955

Honorable Dave W. Ling, United States District Judge, Presiding.

Defendants' Motion for New Trial comes on regularly for hearing this day. Ronald Webster, Esq., is present for the plaintiffs. James Henderson, Esq., is present for the defendants. On motion of counsel for the defendants,

It Is Ordered that said Motion for New Trial be and it is amended to show the same as a Motion to Set Aside Findings of Fact and Conclusions of Law and Judgments in Civ-1921 and Civ-1922 and to Enter Judgments for the Defendants, or in the Alternative for a New Trial.

It Is Ordered that said Motion to Set Aside Findings of Fact and Conclusions of Law and Judgment and Enter Judgment for the Defendants, or in the Alternative for a New Trial, in each of cases Civ-1921 and Civ-1922, is denied.

On motion of counsel for the defendants,

It Is Ordered that execution of judgment be stayed for a period of 10 days from this date.

(Docketed February 21, 1955.)

[Title of District Court and Cause.]

No. 1921

NOTICE OF APPEAL

Notice is hereby given that Griffen Buick, Inc., and J. W. Nation, Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final Judgment entered in this action, and from the Order Denying Defendants' Motion to Set Aside Findings of Fact, Conclusions of Law, and Judgment entered thereon, and to enter Judgment for Defendants, or in the alternative, for a new trial entered in this action on February 21, 1955.

Dated March 3rd, 1955.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Appellants.

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

No. 1922

NOTICE OF APPEAL

Notice is hereby given that Griffen Buick, Inc., and J. W. Nation, Defendants above named, hereby appeal to the United States Court of Appeals for

the Ninth Circuit, from the final Judgment entered in this action, and from the Order denying Defendants' Motion to Set Aside Findings of Fact, Conclusions of Law, and Judgment entered thereon, and to enter Judgment for Defendants, or, in the alternative, for a new trial entered in this action on February 21, 1955.

Dated March 3rd, 1955.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Appellants.

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

Nos. 1921 and 1922

STATEMENT OF POINTS

Appellants, Defendants above named, state that the points upon which they intend to rely on appeal in this consolidated action, are as follows:

I.

The Court erred in finding that the motor vehicle in which Plaintiff's Intestates were riding, was being operated in a careful and prudent manner and with due regard for the safety of others on the highway.

II.

The Court erred in finding that Defendant-Appellant J. W. Nation, wantonly and wilfully placed said tow car, and caused said tow car to be placed on said highway in such a position and location as to imperil the lives and property of persons traveling in motor vehicles on said highway.

III.

The Court erred in finding that Defendant-Appellant J. W. Nation, wilfully and wantonly failed and neglected to give and place suitable warnings of the position and location of said tow car.

IV.

The Court erred in finding that said Defendant Nation recklessly and negligently operated, maintained and controlled said tow car.

V.

The Court erred in finding that the collision and the injuries and death of Plaintiff's Intestates directly and proximately resulted from wilful and wanton misconduct and from recklessness and negligence of Defendant, J. W. Nation.

VI.

The Court erred in finding that the Estates of Plaintiff's Intestates was diminished, depleted and damaged in any sum whatsoever as a direct and proximate result of "said wilful and wanton misconduct, and of said recklessness and negligence on the part of Defendant Nation."

VII.

The Court erred in finding that the sole, proximate cause of said collision and of the deaths of Plaintiff's Intestates, and of the damage to the estates thereof, was the "said wilful and wanton misconduct and said recklessness and negligence of said Defendant Nation."

VIII.

The Court erred in finding that at the time and place of said accident, the Plaintiff's Intestate was not guilty of any negligence or want of care which contributed as a proximate cause of said collision or of said deaths or of said damages.

IX.

The Court erred in making the conclusion of law that the Plaintiff's were entitled to any judgment whatsoever against the Defendants, Griffen Buick, Inc., and J. W. Nation, jointly and severally in either Civ. 1921 Phoenix or Civ. 1922 Phoenix.

X.

The Court erred in failing to find that General Grant Greer, Jr., deceased, was guilty of contributory negligence.

XI.

The Court erred in failing to find that General Grant Greer, Jr., deceased, was guilty of negligence.

XII.

The Court erred in failing to find General Grant Greer, Jr., deceased, was guilty of gross, wilful and wanton negligence.

XIII.

The Court erred in failing to find that General Grant Greer, Jr., deceased, was negligent and that such negligence was imputed to Rubby Greer.

XIV.

The Court erred in failing to find that Defendant-Appellant J. W. Nation, and therefore Defendant-Appellant Griffen Buick, Inc., was not guilty of any negligence.

XV.

The Court erred in denying Defendant's Motion for Judgment for Defendants.

XVI.

The Court erred in denying Defendant's Motion to Set Aside Findings of Fact and Conclusions of Law, Judgment, and to enter Judgment for Defendants, or in the alternative for a New Trial.

XVII.

The Findings of Fact, Conclusions of Law and Judgments are not justified by the evidence and are contrary to the evidence and to the law in both Civ. 1921 Phoenix and Civ. 1922 Phoenix.

Dated this 10th day of March, 1955.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

Nos. 1921 and 1922

STIPULATION

Comes now Plaintiff in each of the above-entitled causes, by and through his attorneys of record, C. Ray Robinson, Thomas L. Berkley, and Clark and Clark, by Ronald Webster, and the Defendants by and through their attorneys, Gust, Rosenfeld, Divelbess & Robinette by James F. Henderson, and stipulate and agree that the above-entitled causes may, subject to approval by the United States District Court for the District of Arizona, and the United States Court of Appeals for the Ninth Circuit, be consolidated on appeal on the grounds that these cases were consolidated and tried together in the United States District Court for the District of Arizona, and that all proceedings on each of them were consolidated proceedings in said District Court; and for the further reason that such consolidation on appeal will avoid an undue burden upon the Court and will avoid hardship and additional expense to each and all of the parties hereto.

C. RAY ROBINSON,

THOMAS L. BERKLEY,

CLARK & CLARK,

By /s/ RONALD WEBSTER, JR.,
Attorneys for Plaintiff.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants.

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

Nos. 1921 and 1922

ORDER

Good Cause appearing therefor,

It is Ordered that the time for filing the record on appeal and docketing the appeals herein in the United States Court of Appeals for the Ninth Circuit be, and it is hereby, entended to and including April 30, 1955.

Dated at Phoenix, Arizona, this 12th day of April, 1955.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed April 12, 1955.

In the District Court of the United States,
District of Arizona

Civil 1922

LONDON EVANS, Administrator of the Estate of RUBBY GREER, Deceased,

Plaintiff,

vs.

GRIFFEN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

Civil 1921

LONDON EVANS, Administator of the Estate of GENERAL GRANT GREER, JR., Deceased,

Plaintiff,

vs.

GRIFFEN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Proceedings had and evidence taken in the above-entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, on the 12th day of February, A.D. 1954, at ten o'clock a.m.

Present:

R. A. McCORMICK,
CLARK & CLARK, By
RONALD WEBSTER, JR., and
THOMAS BERKLEY,

Appeared for Plaintiffs.

GUST, ROSENFELD, DIVELBESS & ROBINETTE, By
JAMES F. HENDERSON and
DEVENS GUST,

Appeared for Defendants.

The Clerk: Civil 1922, Phoenix, London Evans, etc., plaintiff, versus Griffen Buick, Inc., etc., et al., Defendants, for trial. Civil 1921, Phoenix, London Evans, etc., plaintiff, versus Griffen Buick., Inc., etc., et al., defendants, for trial.

Mr. Webster: Plaintiff is ready, your Honor.

Mr. Henderson: Defendants are ready, your Honor.

The Court: You may proceed.

Mr. Webster: If your Honor please, at this time I would like to present for association in this matter two attorneys from the State of California, who are duly admitted to practice there in the federal courts of the districts in that state, Mr. McCormick of the office of Mr. Robinson, who [2*] is attorney of record, and Mr. Thomas Berkley, who is appearing in his own name also.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: All right, the record may so show.

Mr. McCormick: We call Officer Cochran as our first witness.

(Thereupon, the plaintiffs, to maintain the issues on their parts, introduced the following evidence, to wit.)

LOUIS O. COCHRAN

called as a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McCormick:

Q. Officer, what is your full name?

A. Louis O. Cochran.

Q. What is your business or occupation, officer?

A. Patrolman of the Arizona Highway Patrol.

Q. Where do you live?

A. Yuma, Arizona.

Q. How long have you been so occupied?

A. Four and one-half years.

Q. Directing your attention to the evening of December 23, 1952, did you have occasion to [3] investigate an accident? A. Yes, I did.

Q. And about what time did you receive the call?

A. Approximately twenty minutes of eleven p.m.

Q. And where were you when you received this call? A. At home.

Q. Did you proceed to the point of the accident?

A. Yes.

(Testimony of Louis O. Cochran.)

Q. And where was that with relation to Yuma?

A. It was two-tenths of a mile east of Mile Post Number 17 on Highway 80.

Q. How many miles would that be from Yuma, approximately? A. From Yuma proper?

Q. Yes.

A. It would be seventeen miles. The mileage starts at the center of the Colorado bridge.

Q. Did you proceed alone to the scene of the accident? A. Yes.

Q. And when you arrived there, about what time was it?

A. Approximately five minutes after eleven.

Q. And what did you observe insofar as the [4] vehicles involved were concerned?

A. In regard to vehicles involved?

Q. Yes.

A. There were three vehicles involved. One was a semi-trailer, the other a GMC wrecker truck, and the other a Buick sedan.

Q. All right. Where was the Buick sedan with relation to the trailer?

A. It was underneath the rear of the trailer.

Q. Did you also inspect the damage to the rear of the trailer? A. Yes, I did.

Mr. McCormick: Mark this Exhibit for identification, please.

The Clerk: Plaintiff's Exhibit Number 1 for identification.

(Said object was marked as Plaintiff's Exhibit Number 1 for identification.)

(Testimony of Louis O. Cochran.)

Q. (By Mr. McCormick): Let me show you, Officer, what purports to be a view of the trailer, and ask you if you recognize it as such?

A. Yes, I believe it is.

Q. Does the damage which appears at the rear of that trailer in the photo fairly and accurately represent the damage that you observed to the [5] trailer at the scene of the accident? A. Yes.

Mr. McCormick: I will offer this in evidence, if the Court please, as Plaintiff's Exhibit Number 1.

The Court: Any objection?

Mr. Henderson: No objection, your Honor.

The Court: It may be received.

(Said photo was received in evidence and marked as Plaintiff's Exhibit Number 1.)

Q. (By Mr. McCormick): Officer, at the scene of the accident did you inspect the damage to the Buick automobile after it was pulled out from underneath the rear of the trailer?

A. Yes, I did.

Mr. McCormick: If you have no objection, counsel, do you mind if I simply put these in evidence?

Mr. Henderson: None whatsoever.

Q. (By Mr. McCormick): Officer, let me show you a series of photos purportedly of the Buick, taken from various angles, and ask you to inspect these (handing photos to witness).

A. Yes, sir. [6]

Q. Do all of those photos, Officer, fairly and ac-

(Testimony of Louis O. Cochran.)

curately represent the damage to the Buick automobile involved in this accident, as you observed it at the scene? A. Yes.

Mr. McCormick: With the Court's permission, I will offer these as Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8.

The Clerk: Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8 in evidence.

(Said photographs were received in evidence and marked Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8.)

Q. (By Mr. McCormick): Now, Officer, you have described the third vehicle involved as a GMC tow truck? A. Yes, that is right.

Q. And did you observe that truck at the scene of the accident? A. Yes, I did.

Q. And did the truck carry any insignia on its sides or rear? A. I believe so, yes.

Q. And what was the insignia, as you recall it?

A. Griffen Buick Company.

Q. Did you observe the damage to that [7] vehicle? A. Yes.

Mr. McCormick: May these be marked for identification?

The Clerk: Plaintiff's Exhibits 9, 10, 11, and 12 for identification.

(Said photos were marked as Plaintiff's Exhibits 9, 10, 11, and 12 for identification.)

(Testimony of Louis O. Cochran.)

Q. (By Mr. McCormick): Officer, would you examine these four photos of what purports to be the tow truck involved in the accident?

A. Yes, that was the truck.

Q. That is the truck? A. Yes.

Q. And is the damage that appears on the left-hand side of that truck, does that fairly and accurately represent the damage to it as you recall it existing at the scene of the accident?

A. It does.

Q. And do the other views fairly and accurately represent the general condition of the truck as you observed it at the scene?

A. Yes, sir. It does.

Mr. McCormick: If the Court please, I will offer these in evidence as Plaintiff's Exhibits next in order. [8]

Mr. Henderson: No objection.

The Clerk: Plaintiff's Exhibits 9, 10, 11, and 12 in evidence.

(Said photographs were received in evidence and marked Plaintiff's Exhibits 9, 10, 11, and 12.)

Q. (By Mr. McCormick): Now, officer, are you generally familiar with the terrain and the roadway where this accident occurred?

A. Yes, sir.

Q. And had you been for many years prior to the accident? A. Yes.

(Testimony of Louis O. Cochran.)

Q. And have you had occasion to pass over it since the accident?

A. That happens to be my territory. I drive in it every day.

Q. Has there been any change of any kind in the general terrain, roadway and shoulders, and sides of the road since this accident happened?

A. No.

Mr. McCormick: Let me first offer both these photos as Plaintiff's Exhibits next in order for identification at this time, if your Honor please.

The Clerk: Plaintiff's Exhibits 13, 14 for [9] identification.

(Said photos were marked as Plaintiff's Exhibits 13 and 14 for identification.)

Q. (By Mr. McCormick): Officer, at the point at which you found the vehicles involved in this accident, as you would approach the point from an easterly direction going west, was there a knoll or sand hill to the right-hand side just prior to reaching the vehicles? A. Yes, there was.

Q. All right, let me show you Plaintiff's Exhibit 13 for identification, and ask you first if you recognize that as a photo depicting the approximate scene of this accident?

A. Yes, that is correct.

Q. And does the knoll that I have just questioned you about appear in that picture?

A. Yes, it does.

Q. Would you take this pen, if you will, and

(Testimony of Louis O. Cochran.)

indicate an arrow indicating the knoll to which you are referring? A. (Witness complies.)

Q. Now, that photo, Plaintiff's Exhibit 13 for identification, fairly and accurately, then, portrays the scene of the accident and the roadway, looking back in an easterly direction, showing the terrain as [10] one would approach the scene?

A. That is right.

Q. And does it fairly and accurately depict the vehicle conditions as they were at the time this accident occurred? A. Yes.

Q. Directing your attention to Plaintiff's Exhibit 14 for identification, do you recognize that as an approximate duplicate of Plaintiff's Exhibit Number 13? A. Yes, I believe it is.

Q. Would you indicate the knoll in that picture also, please? A. (Witness complies.)

Q. And does that picture generally, fairly and accurately portray the physical condition as it existed on the night of the accident, and showing the approach in an easterly direction, and coming west to the point where this accident occurred?

A. Yes.

Q. When you arrived at the scene, was the semi-trailer you have described in a position in the roadway which would be shown by this picture?

A. Not in the roadway.

Q. Well, would it be at a point which is [11] evidenced there by this picture? A. Yes.

Q. Was that semi-trailer on or off the highway?

A. It was off the highway.

(Testimony of Louis O. Cochran.)

Q. To your knowledge, had it been moved prior to your arriving at the scene, subsequent to the accident? A. No.

Q. Could you draw a rectangle for me on Plaintiff's Exhibit 14 for identification, to indicate the position of the semi-trailer as you observed it at the scene?

A. (Witness complies.) Really, I don't believe the picture shows far enough west in it to draw in where my truck was sitting.

Q. Well, let me put it this way. Could you indicate the side of the road on which you found the truck? A. Yes, sir, I can do that.

Q. I wonder, could you label that "truck," please? A. (Witness complies.)

Q. Now, that semi was attached to a tractor, was it not? A. Yes, sir. [12]

Q. And which direction was the tractor facing?

A. It was facing in a southwesterly direction.

Q. Yes. Did you measure the nearest portion of that semi to the north side of the highway?

A. Yes, I did.

Mr. McCormick: Counsel, would you mind if I labeled North, South, East and West on this photo?

Mr. Henderson: Pardon?

Mr. McCormick: Just draw an arrow, North, South, East, and West?

Mr. Henderson: Yes.

Mr. McCormick: Do you have any objection?

Mr. Henderson: That is all right.

(Counsel marks photos.)

(Testimony of Louis O. Cochran.)

Q. (By Mr. McCormick): So that as we view Plaintiff's Exhibit 14 for identification, the semi would have been on the north side of the highway?

A. That is correct.

Q. Did you measure how far off the highway it was? A. It was four feet.

Q. Four feet off the highway? A. Yes.

Q. Let me show you next, Officer, a view taken approximately 1,000 feet back from the point [13] at which the accident occurred, and ask you if you recognize it as a view taken from the east side looking west as you approached the scene of this accident? A. Yes.

Q. Does that fairly and accurately represent the roadway and the general condition of the terrain as depicted in that picture, as pertained to the night of the accident? A. It does.

Mr. McCormick: I will offer this in evidence as the next exhibit in order, if the Court please.

Q. (By Mr. McCormick): Let me show you a view which purportedly is taken looking the same way, but at a point approximately 800 feet prior to reaching the scene of the accident, and ask if you recognize such?

Mr. Henderson: If it please the Court, may I reserve objection until he has gone through all of these? I have objections to certain pictures.

Mr. McCormick: All right. Perhaps I better have them marked for identification at this time.

The Clerk: Plaintiff's Exhibit 15 for identification.

(Testimony of Louis O. Cochran.)

(Said photo was marked Plaintiff's Exhibit 15 for identification.) [14]

Q. (By Mr. McCormick): Will you answer the question, Officer?

The Witness: Yes.

Q. (By Mr. McCormick): And does that fairly and accurately represent the roadway and the terrain, and the general physical conditions leading up to the point at which this accident occurred?

A. That is correct.

Mr. McCormick: Would you mark that for identification at this time as Exhibit 16?

And will you mark that 17, please, and this one 18, for identification?

The Clerk: Plaintiff's Exhibits 16, 17 and 18 for identification.

(Said photos were marked as Plaintiff's Exhibits 16, 17 and 18 for identification.)

Q. (By Mr. McCormick): Let me show you next Plaintiff's Exhibit 18 for identification, which purports to be a view taken from the east looking west, at approximately 400 feet from the east of the point of impact, or the scene of the accident, and ask you if you recognize it as such?

A. Yes. [15]

Q. And does it fairly and accurately portray the roadway, and the general physical conditions as you observed them to exist on the night this accident occurred? A. Yes.

(Testimony of Louis O. Cochran.)

Q. Then let me show you Plaintiff's Exhibit 17 for identification, which purports to be a view looking in the same direction, taken approximately 300 feet back from the point at which you found these vehicles, and ask you if that fairly and accurately portrays the roadway and the general physical condition——

Mr. Henderson: Excuse me. Is that 17?

Mr. McCormick: Yes.

Q. (By Mr. McCormick): ——on the night this accident occurred? A. Yes.

Mr. McCormick: Now, at this time, if the Court please, I will offer into evidence Plaintiff's Exhibits 15, 16, 17 and 18.

Mr. Henderson: May I ask a question on voir dire?

The Court: Yes.

Q. (By Mr. Henderson): I hand you Plaintiff's Exhibit 15 for identification, and ask you if you can tell how high above the roadway the camera was placed at the [16] time that picture was taken?

A. I don't want to be sure on that. Possibly from the height of a man standing in the center of the road and holding the camera.

Q. Can you tell from the picture the distance from where the picture is taken to the slight bend in the road?

A. Along approximately the northerly road at that point.

Q. Can you see in that picture the scene of this accident?

(Testimony of Louis O. Cochran.)

A. From this point, I don't believe so.

Q. And how far on down the road, or this way, would be purely hypothetical?

A. I didn't understand the question, sir.

Q. In other words, it would be just a guess if you attempted to locate where this spot in the road was from the scene of the accident?

A. It would be an approximate figure, yes.

Mr. Henderson: Your Honor, we object to the introduction of that picture in evidence, due to the failure to establish the relationship of that particular part of the road to the scene of the accident.

Mr. McCormick: If the Court please, could I ask the witness just one question? I believe I [17] could take care of that.

The Court: All right.

Q. (By Mr. McCormick): Officer Cochran, do you observe in Plaintiff's Exhibit Number 15 the knoll that you heretofore pointed out in Plaintiff's Exhibits 3 and 4, I believe it is?

A. Yes, I do.

Q. And do you observe in Plaintiff's Exhibits 16. 17 and 18 the same knoll that you have heretofore pointed out in Plaintiff's Exhibits 3 and 4, which were closeups? A. Yes, sir.

Mr. Henderson: I think that would make it a question——

The Court: Where is the knoll? Show me the knoll.

Q. (By Mr. McCormick): Will you point out

(Testimony of Louis O. Cochran.)

the knoll? A. It is this ridge in here.

Q. Would you point the knoll out on all of them, if you please?

A. Yes. (Witness marks on exhibits.)

Mr. Gust: If it please the Court, I think that the purpose of these pictures is to show a purported obstruction to the view. I think if that [18] is the case, I think it is incumbent on the plaintiff to show the height from which the pictures were taken.

Mr. McCormick: My position is that the pictures were taken so far away that whether it was waist high or otherwise would make no difference.

Mr. Henderson: Our position is that the knoll would appear to be a greater obstruction than it actually is for somebody driving an automobile.

The Court: I think I can get a pretty good idea of the relative height there of an automobile, whether they can see the knoll driving.

Mr. McCormick: If the Court desires, I have here in the courtroom our investigator, under whose direction these pictures were taken, who was present at the time they were taken. If I may withdraw the Officer for a moment, I should be happy to put him on.

The Court: Go ahead with the Officer and reserve the offer.

Mr. McCormick: I have just one more picture. I showed this to you already. Mark this for identification, please.

The Clerk: Plaintiff's Exhibit 19 for identification. [19]

(Testimony of Louis O. Cochran.)

(Said photo was marked Plaintiff's Exhibit 19 for identification.)

Q. (By Mr. McCormick): Officer, let me show you Plaintiff's Exhibit 19 for identification, and ask you if you recognize that as a picture showing the approximate scene of this accident?

A. Yes, it appears to be.

Q. All right. Does that picture portray the point at which you observed the trailer off to the north side of the road?

A. Yes, I believe that does.

Q. Could you now draw a rectangle with this pencil showing the approximate position of that trailer with relation to the westbound lane?

A. (Witness complies.)

Q. And the distance from the left-hand side of that trailer to the right-hand side of the westbound lane you said is four feet?

A. Yes. That is about it.

Mr. McCormick: All right. Let us label that trailer. (Counsel marks on photo.)

Could I label four feet in here also?

Mr. Henderson: Yes.

Mr. McCormick: I will offer this Plaintiff's Exhibit next in order, if the Court please. [20]

Mr. Henderson: No objections to 19.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit 19 in evidence.

(Said photo was received in evidence and marked Plaintiff's Exhibit 19.)

(Testimony of Louis O. Cochran.)

Q. (By Mr. McCormick): Now, Officer, when you arrived at the scene of the accident, did you determine who were the operators of the three vehicles involved? A. Yes.

Q. Taking the tractor and semi-trailer first, who was the operator of that vehicle?

A. Joseph Herman Zektzer.

Q. And then directing your attention to the operator of the tow truck, did you determine who that was? A. Yes.

Q. Who was that?

A. J. W. Orby Nation, N-a-t-i-o-n.

Q. Then directing your attention to the Buick automobile, did you determine who the occupants of that Buick automobile were? A. Yes.

Q. Who were they?

A. Reverend General Grant Greer.

Reverend General Grant Greer and his [21] wife Rubby Greer, Rubby Jewel Greer.

Q. How did you make that identification, Officer?

A. Through papers and documents in their purses.

Q. Did you determine the registration, the ownership and registration of the Buick automobile?

A. Yes.

Q. What was that?

A. It was registered to a church. I don't recall the name of it at this time.

Q. All right. Now, then, did you observe any skid or tire marks leading up to the rear end of

(Testimony of Louis O. Cochran.)

this Buick? A. There were no skid marks.

Q. All right. And you have already described that the Buick was in underneath the semi-trailer, which was four feet off on the right-hand side of the road, as you drove west?

A. Yes, that is right.

Q. Where did you observe the tow truck?

A. At the time I arrived, the tow car was approximately thirty feet east of the wrecked Buick, and sitting in a northeasterly direction on the north shoulder of the road. [22]

Q. At that time, was it completely off the paved portion of the road? A. Yes, it was.

Q. And had you determined that it had been moved prior to your arrival at the scene?

A. Yes, that was determined.

Q. All right. Now, what was the condition of General Grant Greer and his wife as you observed it? A. They were deceased.

Q. They were still in the Buick?

A. They were, yes.

Q. When you arrived at the scene of the accident, did you come from a westerly direction going east, is that correct? A. That is right.

Q. What, if anything, did you observe at the scene by way of flares, or pots, or red lights, or other warning devices?

A. There were red fusees, burning fusees on the roadway. I believe there was one directly opposite the wrecked vehicles in the center of the road.

(Testimony of Louis O. Cochran.)

Q. When you say one, what do you mean, a fusee?

A. One fusee, and then east of the wrecked [23] vehicles about 100 yards there was another burning fusee.

Q. And where was that with relation to the roadway?

A. It was on the north shoulder of the roadway.

Q. On the shoulder. Did you observe any westerly?

A. Not when I arrived. I believe that there had been one, but it had burned out, and I placed flares shortly after arriving myself.

Q. You placed them? A. Yes.

Q. Now, incidentally, what are the widths of those lanes?

A. The complete width of the pavement at that point is 39 feet, and I suppose the center line directly divides that, yes.

Q. Now, at the scene of the accident, Officer, did you observe Mr. Nation, the man who operated the tow truck? A. Yes.

Q. And do you recognize him here in the court room? A. Yes, he is here.

Q. Did you have a conversation with him at [24] the scene of the accident? A. Yes, I did.

Q. And who was present during that conversation?

A. The driver of the semi, I believe, was there at the time, and also there were a couple of attendants from an ambulance there.

(Testimony of Louis O. Cochran.)

Q. And what was said during that conversation between you and Mr. Nation?

A. I asked what had happened, and he stated that he had been called to pull the semi out of the sand, that it got stuck off the road in the deep sand, and that he had attempted to pull it out in a southwesterly direction, but had succeeded in putting it deeper into the sand, and then had reversed the procedure, and had gone to the back of the semi, hooking onto the back of it, and watching it back, and had almost got it back out of the sand where he could drag it back up on the road.

Q. Did he tell you the position of his tow truck as he was attempting to pull the trailer rearward?

A. Yes, he showed me on the pavement where he said he had been sitting.

Q. And where did he show you? [25]

A. It was approximately four feet south of the edge of the pavement, of the north edge of the pavement, and with the tow truck heading in an easterly direction.

Q. And did he show you how far his tow truck had extended into the westbound northerly lane?

A. Well, the point he showed me was—would have been the left side of the wrecker where it had sat, and judging from that, why you could surmise where the other side of the vehicle would have been in regard to the traffic.

Q. And where would that have been with relation to the white line?

(Testimony of Louis O. Cochran.)

A. It would have been approximately ten feet from the center line.

Q. And would that be the left side of the tow truck, or the right side?

A. The right side of the tow truck.

Q. As it would face east?

A. As it faced east, yes.

Q. Did you have any conversation with defendant Nation in regard to what type and character of warning devices were out at the time of this accident? A. Yes.

Q. And what generally was that conversation, as [26] you recall it?

A. He stated that they had put out flares, or burning fusees, that is what they were, and I believe that is the extent of it.

Q. I beg your pardon?

A. I say, I believe that is the extent of it.

Q. Did he point out to you where those fusees were placed with relation to the eastern side of the point of impact of the vehicles? A. Yes.

Q. And where was that?

A. It was directly opposite the point of the knoll that is shown on the pictures, and I would say approximately 100 yards east of the point of impact.

Q. One hundred yards? A. Yes.

Q. And was there any conversation about that fusee having been run over?

A. Not that particular fusee. It was burning at the time I arrived.

(Testimony of Louis O. Cochran.)

Q. Oh. Could I interrupt just a minute, Officer? Did he state to you that the fusee burning at the time you arrived was the same one burning at the time this accident happened? [27]

A. No. I believe that he stated that there had been two sets of fusees put out, and that the first one was the one that had been run over.

Q. I see.

A. By either the Buick that had run under the semi, or some car following close behind.

Q. When he referred to the fusees that had been run over, did he refer to the one that was out at the time of the accident on the eastern side of the point of impact? A. Yes.

Q. Did you, Officer, make a search for a damaged or run-over fusee? A. Yes, I did.

Q. Were you able to find any evidence of any damage to a run-over fusee?

A. I looked for it that night, and also went back the next morning to check the scene, and I could find no damaged flare.

Q. By the way, Officer, how high is that knoll that appears in the photos introduced in evidence?

A. Well, I have never measured that, sir, but I would say that from the level of the roadway to its highest point would be approximately 15 feet.

Q. All right, and does the point at which [28] this accident occurred, at that point, is the road straight or is it a curve? A. It is a curve.

Q. And as you would be coming west, it would curve which way, to your right or left?

(Testimony of Louis O. Cochran.)

A. It would curve to the right.

Q. And is the roadway at that point level, or is there a grade? A. There is a grade.

Q. And as you would be coming west approaching the point at which this accident occurred, would you be going up or down hill?

A. Going uphill.

Q. Did you ask Mr. Nation the time at which this accident occurred? A. Yes.

Q. And what did he say?

A. The time that was given me was 10:15 p.m.

The Court: How far east was Yuma? I didn't hear you.

The Witness: Seventeen miles.

Mr. McCormick: I have no further questions.

The Court: Do you gentlemen have any questions?

Mr. Henderson: Yes, your Honor. [29]

Cross-Examination

By Mr. Henderson:

Q. Did you determine how far off of the north edge of the highway these fusees were placed?

A. A foot or so.

Q. And did you determine whether there was any other type of warning in addition to the fusee located at the scene of the accident by Mr. Nation?

A. There were none that I saw.

Q. During this conversation with Mr. Nation,

(Testimony of Louis O. Cochran.)

did he indicate to you whether or not any glass reflectors had been placed as a warning?

A. I don't recall that, sir.

Q. Would it be possible, in this discussion of the Buick having run over a fusee, that it might have involved a reflector rather than a fusee?

A. That is possible. We call a fusee a fusee. We don't call it a flare, and to the general public, fusees are flares. And I believe he spoke of it as a flare.

Now, he possibly could have meant that it was a reflector-type flare.

Q. Now, at that particular point in the road, are there at the side of the highway any of these side reflectors, I guess we would call them, put up by the highway department to denote the edge of [30] the pavement? A. Yes, there were.

Q. And were there any of those reflectors between the knoll of which you speak and the scene of the actual accident?

A. Yes. There were, I believe, two, or possibly three.

Q. Did you determine whether any of those reflectors had been damaged?

A. One of them had been run over by the Buick.

Q. And where was that reflector in relation to the point of collision?

A. At approximately 35 feet back of the point of impact of the semi.

Q. Would that be east of the semi?

A. Yes.

(Testimony of Louis O. Cochran.)

Q. And how far were those located off the edge of the highway?

A. Those are set about a foot or a foot and a half off the edge of the pavement.

Q. Now, you have stated that the knoll was approximately 15 feet above the road level at its highest point? A. Yes.

Q. How far to the north edge of the highway was the highest point of the knoll? Was it right at [31] the edge of the highway?

A. No; it would be about 50 feet back from the edge of the pavement.

Q. In other words, then, it sloped upwards from the edge of the highway up to the high point, which was 50 feet north of the north edge of the highway?

A. Yes; that is correct.

Q. And the slope started from the edge of the highway, did it, and went gradually up to 50 feet?

A. No; it was not too gradual. It was rather a round slope.

Q. But the entire slope to the high point covered 50 feet? A. Yes.

Q. About what is the percentage of the uphill grade the Buick would have traveled as it approached the point of collision?

A. I would say two per cent grade.

Q. Did you note the weather conditions on the night of this accident? A. Yes.

Q. What were those conditions?

A. It was a starlight night, and no clouds, and the road was dry.

(Testimony of Louis O. Cochran.)

Q. And was the moon out that night? [32]

A. No, sir; no moon.

Q. Were you able to establish the point of impact between the Buick and the wrecker?

A. Only by the debris that was left on the highway at the point where the impact was said to have occurred.

Q. And did that debris substantiate what had been told you as to the place of impact?

A. Yes, it did.

Q. And where was that point of impact from the north edge of the highway?

A. Four feet from the north edge of the pavement.

Q. That would be four feet south of the pavement, or north?

A. Four feet south of the north edge of the pavement.

Q. Now, Officer, were you able to determine the course of the Buick automobile from the time it first collided with the wrecker until it finally came to rest? A. Yes.

Q. How were you able to determine that course?

A. By the marks of the tires in the sand.

Q. And what was the point of impact between the Buick and the wrecker? [33]

That question may be a little confusing. What I am trying to get at is, what parts of the Buick and the wrecker collided?

A. The wrecker was apparently hit on the left front bumper, and then the damage continued on

(Testimony of Louis O. Cochran.)

back down the left side, all the way back, and side-swiping below, is what I would call it.

Q. Then the Buick came in contact with the wrecker and glanced off to its right, and went under the back end of the trailer?

A. No; it was more of a straight line. The tracks of the Buick came directly off the curve, had the curve continued in its northwesterly direction. And the tracks of the Buick were in a direct line. After hitting the wrecker, they didn't swerve, they just continued straight up in the same direction.

Q. Did you determine the condition of that shoulder on the left side of the road while you were there? A. Yes.

Q. And what is the composition of the shoulder?

A. For a couple of feet it is made up of decomposed granite, I believe, and clay, and, then, for the, well, indefinite distance out there, it is just desert, pure sand. And at that point it was [34] what we would call blow sand. It was, rather, a very soft, light mixture.

Q. About how deep was the blow sand?

A. I would say the semi was stuck about eight inches deep in it.

Q. About eight inches in the sand?

A. Yes.

Q. Did you inspect the inside of the Buick when you arrived at the scene of the accident?

A. Yes. I did.

Q. And what did you find in the Buick besides the bodies of the decedents?

(Testimony of Louis O. Cochran.)

A. The clothing of the parties, and there was quite a number of childrens' clothing and childrens' toys.

And also packages of food, I think there was half a loaf of bread, and other groceries in the car.

Q. Were these open food? A. Yes.

Q. Did you determine at your investigation whether or not at the time of this collision the tow truck had been hooked onto the back of the trailer?

A. Yes; it had apparently been hooked on, because the boom had been jerked loose from the [35] wrecker.

Q. And could you determine whether or not the tow truck at that time was sitting with its gear disengaged, or with its brakes on?

A. I wouldn't be able to state that, sir, because, as I said previously, the vehicle had been moved when I arrived.

Q. Were you able to determine whether the force of the impact of the Buick striking the back of the trailer had moved the trailer and tractor?

A. Yes; it could be determined.

Q. And how far did you determine that it had been moved?

A. It had moved it forward two feet.

Q. And was the tractor, were the tractor and trailer in a jackknife or still in a straight position?

A. No; the trailer was what I would call parallel to the road, and the tractor was sitting with the front end in a more southerly direction and nearer the highway.

(Testimony of Louis O. Cochran.)

Q. And did you inspect the under carriage of that trailer at all for damage?

A. Yes; I did.

Mr. Henderson: Mark this Defendants' Exhibit A for identification. [36]

Mr. McCormick: You can put them in if you want.

Mr. Henderson: All right.

The Court: They may be received.

The Clerk: Defendants' Exhibits A and B in evidence.

(Said photographs were received in evidence and marked as Defendants' Exhibits A and B.)

Q. (By Mr. Henderson): I hand you Defendants' Exhibit A in evidence, and ask you if you recognize that as a photograph of the part of the trailer in question? A. Yes.

Q. And does that fairly and accurately represent the condition of the under carriage of the trailer in question? A. That is correct.

Q. And I hand you Defendants' Exhibit B, and ask you if you recognize that as a picture of a part of the trailer in question? A. Yes.

Q. And does that fairly and accurately represent the condition which you found on your inspection?

A. It does. [37]

Q. Will you describe from Defendants' Exhibit A what damage you see there?

(Testimony of Louis O. Cochran.)

The Court: He doesn't have to take time to do that.

Mr. Henderson: All right, your Honor.

Q. (By Mr. Henderson): In both of these photographs which show the various pins or rivets that were sheered off on this under carriage, can you tell us the size of those rivets?

A. That was about a three-quarter-inch rivet.

Q. Did you determine how many rivets had been sheered off?

A. I believe there were five in that particular spring.

Q. Did you find any of the parts of these rivets?

A. Yes; the next morning I picked up the head of one of the rivets across the pavement, on the south side of the road.

Q. How far was that from the actual scene of the accident? A. Approximately forty feet.

Q. Did you find any other damage relative to the under carriage of the truck?

A. At the rear end, yes, was damaged. [38]

Q. Did you find any damage to the back axle?

A. Only where the spring hangers were knocked loose. That is all that I recall.

Q. Now, had the under carriage been knocked loose from the trailer itself?

A. Yes; it was knocked slightly farther.

Q. And did you determine whether or not that trailer was loaded at the time of the accident?

A. There was only a partial load on it. I don't

(Testimony of Louis O. Cochran.)

recall the contents, but I recall the driver said he only had a partial load.

Q. Did you determine the weights of the tractor, trailer, or its loads? A. No, I didn't.

The Court: We will have a brief recess at this time.

(Recess was had.)

The Court: You may proceed.

Mr. Henderson: If it please the Court, I would like at this time to withdraw my objections to Plaintiff's Exhibits 15, 16, 17 and 18 for identification.

The Court: Very well.

Mr. McCormick: I will reoffer them.

The Court: They may be received. [39]

The Clerk: Plaintiff's Exhibits 15, 16, 17 and 18 in evidence.

(Said photographs were received in evidence and marked Plaintiff's Exhibits 15, 16, 17 and 18.)

Mr. Henderson: Will you mark this for identification?

The Clerk: Defendants' Exhibit C for identification.

(Said picture was marked Defendants' Exhibit C for identification.)

Q. (By Mr. Henderson): I hand you Defendants' Exhibit C for identification, and ask you whether or not that represents the condition of the shoulder in question? A. Yes, it does.

(Testimony of Louis O. Cochran.)

Q. Were you present when this photograph was taken?

A. I don't recall seeing the picture taken.

Q. Does this photograph fairly and accurately represent the tracks left by the Buick, and showing the position of the trailer at the point of impact? A. Yes, it does.

Mr. Henderson: I offer this in evidence.

Mr. McCormick: I have no objection, as long as he is testifying that it fairly and accurately [40] represents the trailer.

The Clerk: Defendants' Exhibit C in evidence.

(Said photo was received in evidence and marked Defendants' Exhibit C.)

Q. (By Mr. Henderson): I hand you Plaintiff's Exhibit 10, which you have identified as the tow truck involved here. A. Yes.

Q. Now, on that picture where the two lights which appear on the boom of the tow truck, were they on the tow truck on the night in question?

A. Yes, they were.

Q. Did you determine whether or not they were in operating condition at that time?

A. No; I don't recall seeing the lights burning.

Q. Would you put a circle around each of the boom lights on the tow truck, please?

A. (Witness complies.)

Q. Now, from your investigation of the damage to the vehicles involved here, from your determination of the condition of the shoulder, and the con-

(Testimony of Louis O. Cochran.)

dition of the highway, were you able to form an opinion as to the range of speed at which the Buick was traveling immediately prior to the impact?

Mr. McCormick: I will object to that, your [41] Honor, on the ground it calls for the opinion and conclusion of the witness, and something that is the province of the Court to decide from all of the evidence to be presented.

The Court: Probably so.

Mr. Henderson: What is the ruling?

The Court: I think that is so.

Q. (By Mr. Henderson): Mr. Cochran, did you determine whether or not any skid marks were left on the pavement?

A. That is correct. There were no skid marks on the pavement.

Q. There were no skid marks whatsoever?

A. None whatsoever.

Mr. Henderson: I have no further questions.

Mr. McCormick: Just a few questions, Officer.

Redirect Examination

By Mr. McCormick:

Q. Officer, did I understand you to testify that you were present when the Defendants' Exhibit C was taken?

A. I don't recall the picture being taken, no. It is possible I could have been there. I was at the scene with several of the investigators. I don't know who took the picture. [42]

(Testimony of Louis O. Cochran.)

Q. Do you know the identity of the person who took the picture? A. No, I don't.

Q. Or do you know when it was taken?

A. No.

Q. Do you know whether it was taken at night or in the day time?

A. It appears to have been taken in the day time.

Q. Is there anything about the tire marks that appear in that picture that lead you to believe they are the same tire marks that you observed at the scene of the accident?

A. Yes; I believe it is the same scene.

Q. Now, that picture does not, does it, purport to portray the entire length of the entire tire marks that you observed off the shoulder? A. No.

Q. And those tire marks were how long in length?

A. From the point where they first left the pavement, where the back end wheel of the Buick left the pavement, to the rear of the Buick as it sat under the semi, was 44 feet.

Q. I think you said the curve, with the curve of the road, is that what you said in Mr. Henderson's examination? [43]

A. Yes; the point where they left the road, the Buick was following the curve of the road.

Q. Now, the rivet that you found across the road, I take it, was the next day, and I take it you have no idea how it got there?

A. That is correct. It was directly opposite

(Testimony of Louis O. Cochran.)

where the point of impact had occurred, and was some forty feet across the road. I don't know how it got there.

Q. And the reflector, did I understand you to say it was thirty-five feet back of the semi, and about a foot to a foot and a half off the highway?

A. That is approximately the measurements.

Q. Incidentally, Officer, I take it you ran the routine blood tests on the deceased, General Greer?

A. Yes.

Q. It was negative?

A. It was negative.

Mr. McCormick: That is all.

Mr. Henderson: Another question or two, Mr. Cochran.

Recross-Examination

By Mr. Henderson:

Q. Did these tire marks, these forty-four-foot tire [44] marks, did they indicate whether or not the brakes were on at that time?

A. It would be hard to say, because of the softness of the sand. The tire marks that were made where they first went off on the shoulder of the road were made by a rolling tire. You could see the prints of the tire in it.

But once it was in the deep sand, then whether it was rolling, or whether it was skidding couldn't be determined, because the sand was just too soft.

Q. Now, where was it in relation to the tow truck

(Testimony of Louis O. Cochran.)

that these first rolling tire marks in the sand appeared?

A. I don't recall measuring that distance, but I would say it was approximately 20 feet to the east of the wrecker, where the Buick first went onto the shoulder of the road.

Q. And those appeared to be rolling tire marks?

A. Yes.

Q. I hand you Plaintiff's Exhibit 15, which shows the knoll in question.

Would you indicate by an "X" mark the position of the flare that was placed along the highway to the east of the scene of the accident, on [45] that photograph, please?

Mr. McCormick: May I ask counsel what particular flare are you referring to?

Mr. Henderson: The flare that was placed east of the scene of the accident that the patrolman found on his arrival.

Mr. McCormick: Is that the flare he found at the time, or is this the Exhibit? There is testimony that the flare that he saw at the time that he arrived was not the same flare that was burning at the time of the accident.

Mr. Henderson: That is correct; that the one he found was a replacement of the previous flare, I believe.

Mr. McCormick: So that there is no confusion, you are talking about the flare that he observed when he got there?

Mr. Henderson: That is correct.

(Testimony of Louis O. Cochran.)

Mr. McCormick: All right.

(Witness marks Exhibit as requested.)

Q. (By Mr. Henderson): Would you draw a line out to the clear part and indicate the word "flare," please?

A. (Witness complies.)

Q. May I ask you to make the same [46] indications on Plaintiff's Exhibits 16, 17 and 18?

A. (Witness complies.) I can't mark it on number 17, because it doesn't show enough of the roadway.

Q. There isn't enough of the road shown on number 17? A. That is correct.

Q. You mean by that, then, that the foreground of the picture is too far to the west of the location of the flare? A. That is correct.

Q. I notice in Plaintiff's Exhibit 18 right near where you have marked the flare, there is a black and white striped post there. Is that one of the reflectors which you mentioned had been bent by the Buick near the scene of the accident?

A. It is similar to the one that was bent.

Q. How does it differ?

A. That one is about a hundred yards east of the one that was knocked down. That is the only difference.

Q. In other words, it was identical in appearance, shape, and size? A. Yes.

Mr. Henderson: I have no further [47] questions.

(Testimony of Louis O. Cochran.)

Redirect Examination

By Mr. McCormick:

Q. Just two questions, Officer.

The flares that you have indicated the position of on Plaintiff's Exhibits 15, 16 and 18 were flares that were observed when you got to the scene of the accident? A. That is correct.

Q. They don't purport to be flares that were there at the time the accident occurred, as far as you know?

A. No. That is the approximate place that the flare was burning when I arrived at the scene.

Q. Then, as I understand your testimony, when you got there you put out additional flares?

A. Very soon after.

Q. Were these flares the fusee type?

A. Yes; they were the burning magnesium flare.

Q. What we would commonly call a fusee?

A. Yes.

Q. All right. Just one more question, Officer.

Having in mind the position of the semi-trailer as you observed it at the scene, and having in mind your experience and knowledge of the highway as you would approach from an easterly direction west at night, would the knoll which we have [48] discussed partially obstruct your vision if you were looking over to the point where you observed the semi?

(Testimony of Louis O. Cochran.)

A. It would completely hide the view at a certain point.

Mr. McCormick: No further questions.

Recross-Examination

By Mr. Henderson:

Q. Officer, at what distance east of the knoll would it completely hide the view?

A. I would say it would approximately be the 150-yard mark, and from there on until you reached a quarter of a mile east of the scene.

Q. Now, if you were as much as a half a mile east, or three-quarters of a mile east on the highway, and approaching this semi, could you see the semi back that far?

A. If it had lights on, you might, yes.

Q. Now, did you determine whether or not that semi was properly equipped with lights at the back end?

A. I don't recall the lights being on at the time I was there. I believe the tail and stop light were broken in the wreck.

Q. But the photograph which has been [49] introduced in evidence showing the back end of that trailer is a true representation?

A. It is, yes.

Q. I hand you Plaintiff's Exhibit 1, and ask you to circle the lights, as distinguished from reflectors, in the back of that trailer.

A. You mean stoplights?

(Testimony of Louis O. Cochran.)

Q. Yes; any lights that would be burning if the lights were on.

A. (Witness complies.) I believe that is it.

Q. Now, you circled eight lights on the back of this semi-trailer. Had those lights been on, then your testimony is that it would have been possible for a car coming from the east approaching the trailer a half to three-quarters of a mile away, to have seen them? A. Yes; that is correct.

Q. I believe your testimony also was that the tractor and trailer and the tow truck were located about 100 yards on west of the knoll in question?

A. Yes.

Q. Do you know what the visibility of these fusees is?

A. I know about how far I can see them down the road. [50]

Q. How far can you see them?

A. I can see them for a mile and a half to two miles.

Q. And where the fusee that you found east of the scene of the accident at the time of your arrival, where that was located, how far to the east of that was there a clear view so that an approaching car could see it?

A. Well, approximately three-quarters of a mile. The road at that point is a letter "S" curve, you might call it, and after it crosses the bridge to the east of the point of impact, it rises for almost the same level as where the accident occurred.

Q. Now, from a point on the north side of the

(Testimony of Louis O. Cochran.)

highway directly alongside the location of that fusee, could the road be seen clearly both to the east and to the west? A. Only to the east.

Q. Only to the east, and none to the west, if you were alongside of that fusee?

A. You could only have seen approximately 150 feet—correction, 150 yards.

Q. You could see 150 yards on west of the fusee?

A. Yes.

Q. And that would be up to the location of [51] the collision, the scene of the accident?

A. Yes.

Mr. Henderson: No further questions.

Mr. McCormick: Two questions.

Redirect Examination

By Mr. McCormick:

Q. Officer, when you arrived at the scene, did you find any electric lanterns of any kind or character at or about the scene? A. No.

Mr. McCormick: No further questions.

Mr. Henderson: That is all.

The Court: That is all.

(Witness excused.)

Mr. McCormick: At this time the Plaintiffs will call the Defendant, J. W. Nation, for cross- examination as an adverse party.

J. W. ORBY NATION

called by the Plaintiff as an adverse witness under the rule, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McCormick:

Q. Your name is J. W. Nation? [52]

A. Yes, sir.

Q. Is that spelled without an "S," N-a-t-i-o-n?

A. Yes.

Q. And the name Orby, is that part of your name? A. Yes.

Q. J. W. Orby Nation? A. Yes.

Q. What is your age, Mr. Nation?

A. Thirty-two.

Q And what is your residence?

A. 2519-8th Avenue, Yuma, Arizona.

Q. How long have you lived in the State of Arizona? A. About seven years.

Q. What is your present business or occupation?

A. Body shop manager and wrecker driver for Buick people.

Q. Is that the same occupation you had on December 23, 1952?

A. It has been changed a little since then. I was a service station manager and wrecker driver.

Q. Directing your attention to December 23, 1952, at that time your primary task on behalf of your employers was the driving of a tow truck, was it not? [53] A. Yes.

(Testimony of J. W. Orby Nation.)

Q. On that evening, you had occasion to go to the scene of an accident?

A. Yes, sir. No, sir, not the scene of an accident, sir.

Q. Oh, the scene of a disabled car?

A. Yes, sir.

Q. That was at whose request?

A. Mr. Zektzer.

Q. And had you any prior acquaintance with Mr. Zektzer? A. Yes, sir.

Q. How long had you known him?

A. Probably three months.

Q. Was that a social or business acquaintance?

A. Business.

Q. Business acquaintance. And on the evening of December 23rd, did he come to your place of business? A. Yes, sir.

Q. And did he tell you that his truck had broken down? A. Yes, sir.

Q. And did he tell you where?

A. Yes. [54]

Q. And where did he say it was broken down?

A. He said out on the highway, about fifteen, or sixteen miles east of Yuma.

Q. As I understand it, he requested that you take your tow truck, and come out and help pull it out, right? A. Yes, sir.

Q. By the way, your employer at that time was Griffen Buick, Incorporated? A. Yes, sir.

Q. And this was their tow truck that you were operating? A. Yes, sir.

(Testimony of J. W. Orby Nation.)

Q. And on the evening in question, you were operating it as their employee, and in the course and scope of your employment, correct?

A. Yes, sir.

Q. What time did you leave your place of business to go to the scene of this disabled truck?

A. I would say around nine-thirty.

Q. And did Mr. Zektzer ride out with you?

A. Yes, sir.

Q. And about what time did you arrive at the scene?

A. It was around ten o'clock, maybe a [55] little before, a little after.

Q. All right, about ten.

What did you do when you first got there?

A. I turned the tow truck around and parked it in front of the——

Q. In front of the tractor and semi?

A. Yes, sir.

Q. Was the semi actually stuck?

A. I don't know what you mean by stuck. It would have pulled out if the motor would have run.

Q. Then the wheels actually weren't down in the sand to the extent it wouldn't have run if the motor would have been in working condition?

A. That is right.

Q. As I understand it, some kind of a noise started, so the driver pulled off the road?

A. Yes, sir.

Q. How far, when you arrived at the scene of the accident, how far off the road was the trailer?

(Testimony of J. W. Orby Nation.)

A. About three or four feet, I guess.

Q. All right, and was it parallel to the westbound lane on the north side of the highway?

A. Yes, sir.

Q. And the tractor, was that also parallel?

A. Yes, sir. [56]

Q. And, of course, it was directly in front of the trailer? A. Right.

Q. And that equipment was facing west, wasn't it? A. Yes, sir.

Q. When you arrived at the scene, where did you first park your tow truck?

A. In front of the stalled vehicle.

Q. You came from a westerly direction east, did you not? A. Yes, sir.

Q. Had you made a U-turn on the highway?

A. Yes.

Q. And pulled in front of the tractor?

A. Yes, sir.

Q. And then what did you do next?

A. Set out fusees.

Q. How many did you set out? A. Two.

Q. And where did you put them?

A. I put them, one about 100 yards behind the trailer.

Q. That would be east?

A. East, on the north side of the road.

Q. And where with relation to the westbound lane? [57]

A. Just as close to the edge of the road as I

(Testimony of J. W. Orby Nation.)

could put it, because it had a nail in it to stick up in the dirt.

Q. Then that wasn't out in the center of the lane, was it? A. No, sir.

Q. It was over off the traversable portion along the shoulder? A. Right.

Q. And that was a normal-type fusee?

A. Yes, sir.

Q. You knew that fusee would burn approximately twenty minutes, did you not?

A. Yes, sir.

Q. And when you arrived at the scene of this disabled truck, was there any warning signal of any kind at or about that truck? A. No, sir.

Q. None whatever? A. No, sir.

Q. Did you place any fusee immediately to the side of the disabled equipment? A. No, sir.

Q. Did you place any other fusees, other than the one you have just described for us?

A. Placed one to the west. [58]

Q. How far to the west?

A. About 100 yards.

Q. About 100 yards also? A. Yes.

Q. And was that also entirely off of the westbound lane and onto the north shoulder?

A. Yes, sir.

Q. And off to where you could dig it down in the ground, right? A. Stick it down, yes.

Q. That also was a fusee? A. Yes, sir.

Q. Of the same type, that burned fifteen or twenty minutes? A. That is right.

(Testimony of J. W. Orby Nation.)

Q. What did you do then?

A. I set out reflectors.

Q. What kind of reflectors were they?

A. They were just round reflectors.

Q. Are they the double type, one on top of the other? A. Yes, sir.

Q. Where did you put those?

A. Right even with the fusee, only out in the highway.

Q. How far out into the highway? [59]

A. A little past—a little closer to the white line than it was to the outside of the highway.

Q. What is the width of those lanes at that point?

A. I think about three and one-half inches. I am not sure.

Q. I meant the width of the westbound lane, or the eastbound lane.

A. Oh, of the highway?

Q. Yes. A. About twenty feet.

Q. Then the reflectors that you placed would be approximately how far from the white line, in feet?

A. Probably eight or nine feet, something like that.

Q. Then after you did that, did you at any time place out any flare pots? A. No, sir.

Q. Did you at any time before you removed this truck place out any red lanterns? A. No.

Q. Were any flare pots or red lanterns placed

(Testimony of J. W. Orby Nation.)

out at any time up to the actual accident that occurred involving the Greers? [60]

A. No, sir.

Q. After you had placed out your fusees and your reflectors, what did you then do?

A. I hooked the cable of the tow truck onto the front of the truck.

Q. Out in the front of the tractor?

A. Yes, sir.

Q. Then what did you do?

A. I started to put the truck in gear to pull it.

Q. And did you make an attempt to pull it?

A. I did.

Q. Was that by actually towing it?

A. Yes, sir.

Q. All right. Was that successful?

A. No, sir.

Q. Then what did you do next?

A. I threw the winch in gear and tried to winch it.

Q. Could you explain for us the distinction between attempting to tow it out, and attempting to winch it out?

A. Well, the winch control is on the back and kind of on the side of the wrecker, so I threw the winch in gear and stepped back in the truck, and put my foot on the brake in the truck all the [61] time the motor was running.

Q. Do you have to put your foot on the brake all the time you are trying to winch it?

A. To keep it from rolling back, you do. It has

(Testimony of J. W. Orby Nation.)

an emergency brake you can set, but you can get more leverage by keeping all four wheel brakes on.

Q. Incidentally, I don't think I asked you. About what time did you arrive at the scene of this accident? A. It was around ten o'clock.

Q. So that it took you approximately half an hour to get there, would that be right?

A. I don't know if I left exactly at nine-thirty or not, but it is around that time.

Q. How much time elapsed after you got there until you attempted—until you put out your flares and reflectors and attempted to winch the truck forward or westward?

A. How long I was there before I put out the flares?

Q. No; how long were you there up until the time you were actually in the process of trying to tow this truck out?

A. Just a matter of minutes.

Q. How much time did you spend attempting to [62] tow the truck westward?

A. Probably four or five minutes.

Q. Mr. Nation, if the truck was not imbedded in the sand, and if your testimony is true that had it been in good mechanical condition, it could have been pulled out, was there a particular reason why you were unsuccessful in pulling it out in a westerly direction? A. Yes, sir.

Q. What was that?

A. Coming up on the highway from the west the slope was steeper in the front.

(Testimony of J. W. Orby Nation.)

Q. So then you were unsuccessful in attempting to pull it westward? A. Yes, sir.

Q. How much time did you spend in making that attempt? A. About four or five minutes.

Q. And then what did you do?

A. I just unhooked and pulled it right around to the back.

Q. And did you back into the rear end of the trailer? A. Back into it?

Q. Back into the rear end, up to the rear end?

A. No; I stopped quite a ways from it even. [63]

Q. How far? How much distance separated the rear end of the trailer and the rear end of your tow truck when you came to a stop?

A. About probably ten steps.

Q. What would that be, thirty feet?

A. Somewhere around there.

Q. And did you then hook onto the trailer?

A. Yes, sir.

Q. And in what manner?

A. I am not sure. I either hooked the line on the spring hammer, or the push bar. I am not positive which.

Q. Then did you commence to attempt to winch the truck backwards? A. Yes, sir.

Q. Were you successful in moving it?

A. Yes, sir.

Q. Prior to this accident? A. Yes, sir.

Q. Do you have any idea how much you moved it? A. I would say about two feet.

Q. About two feet. Then was it at that point

(Testimony of J. W. Orby Nation.)

that you observed this car coming from the east west? A. Yes, sir.

Q. And how far away was that car when [64] you first observed it?

A. I would say between a half and three-quarters of a mile.

Q. And did you observe its lights?

A. Yes, sir.

Q. Did you form an opinion of its speed at that time?

A. Not right at that time, just after that, when I first looked at the lights, then watched it for a second, then I did.

Q. I take it you could tell within a matter of a second it was coming at a certain rate of speed?

A. Yes, sir.

Q. When you first observed that car, what lights were lit on the truck and tractor?

A. All of the lights.

Q. Every light was on the tractor and semi-trailer, was it not, every light that it had?

A. Not the brake light.

Q. But all of the clearance lights were on?

A. Yes, sir.

Q. And the headlights were on? A. Yes.

Q. And they would be shining in a westerly direction? [65] A. Yes, sir.

Q. And I take it that the clearance lights were up on the four corners of the truck, correct?

A. Right, sir.

(Testimony of J. W. Orby Nation.)

Q. And what lights did you have on your equipment?

A. I had the parking lights on, and the two lights in the back.

Q. You say parking lights, as distinguished from headlights? A. Yes, sir.

Q. And I am still talking about when you first observed this approaching car, you did not have your headlights on, did you? A. No, sir.

Q. All right. As I understand it, at the time that you saw this approaching vehicle, the tractor and semi-trailer was about four feet off the highway facing in a westerly direction, right?

A. Yes, sir.

Q. And there was roughly, oh, approximately thirty feet of chain, or whatever you call it?

A. Cable.

Q. Cable between the rear end of the semi-trailer and the rear end of your tow truck?

A. Yes, sir. [66]

Q. And your tow truck was partially out in the highway, wasn't it? A. Yes, sir.

Q. As a matter of fact, I think in your deposition, I think you said your right front wheels were about three feet from the white line?

A. Yes, sir.

Q. And facing in an easterly direction?

A. Yes, sir.

Q. Would you take Plaintiff's Exhibit 14, if you would, and draw a—first, do you recognize that? Do you recognize this as the approximate scene of the

(Testimony of J. W. Orby Nation.)

accident in this area here? A. Yes.

Q. Do you recognize the knoll that was immediately east of the point where this accident occurred?

A. Yes, sir.

Q. And you recognize that as the view you had looking east as you were sitting in your tow truck?

A. Yes.

Q. Would you draw a square on that, having in mind the white line, indicating the approximate position of your truck, the approximate position of your tow truck when you first observed the [67] car coming from the east?

Mr. Henderson: Which Exhibit is that?

Mr. McCormick: I think it is 14, counsel. Yes, 14.

The Witness: Just a square?

Q. (By Mr. McCormick): Here is your white line. You testified in your deposition that the right-hand side of your tow truck was about three feet from the white line. That is what I want, the position of your tow truck.

A. This would be the right front wheels (indicating).

Q. All right.

A. (Witness marks Exhibit as requested.)

Q. All right, now, draw the back wheels.

A. (Witness marks Exhibit as requested.)

Q. Now, would you fill in a square around those four wheels to indicate the position of your truck?

A. (Witness marks Exhibit as requested.)

Q. And you were facing in this direction, right? (Indicating.) A. Yes, sir.

(Testimony of J. W. Orby Nation.)

Q. Now, do you think that you have that facing a little bit too much to the south, having in [68] mind your testimony that the semi-trailer was parallel to the westbound lane facing west?

A. No, I have got to come out that way to be on the highway at an angle.

Q. Actually, you were facing almost directly east, were you not?

A. It was quite a bit at an angle.

Q. Let me ask you this, were you facing more to the east, or more to the south?

A. More to the east.

Q. Doesn't that look to you like you have got it there facing more to the south?

Let us get at it this way.

Take Plaintiff's Exhibit Number 13, and draw in another rectangle to indicate the position of your tow truck when you observed this car coming from the east.

A. (Witness marks exhibit as requested.)

Q. Okay. Let us mark the directions again.

A. (Witness marks exhibit as requested.)

Q. Now, the distance from your right front fender to the white line would be approximately three feet, is that right? A. About that, yes.

Mr. McCormick: All right, let us mark that in. [69]

All right, at this time, your Honor, I will offer in evidence Plaintiff's Exhibits Numbers 13 and 14.

Excuse me. One thing more.

Q. (By Mr. McCormick): Would you indicate

(Testimony of J. W. Orby Nation.)

the cable extending back to the rear of your truck, just the general direction of it?

A. (Witness marks exhibit as requested.)

Q. And do likewise on the other exhibit, please.

A. (Witness marks exhibit as requested.)

Mr. McCormick: I will offer them in evidence at this time, if the Court please.

The Court: Any objection?

Mr. Henderson: Let me see them, first.

No objection, your Honor.

The Clerk: Plaintiff's Exhibits 13 and 14 in evidence.

(Said photographs were received in evidence and marked Plaintiff's Exhibits 13 and 14, respectively.)

Q. (By Mr. McCormick): You have stated that you had just the parking lights on, right?

A. And the lights in the back. [70]

Q. Will you circle the two little parking lights that you had on as you saw this car approaching?

A. (Witness marks exhibit as requested.)

Q. And you did not have the headlights on?

A. No, sir.

Q. All right. Now, directing your attention to Plaintiff's Exhibit 10, when you say you had the back lights on, are those two circled the ones you had on? A. Yes, sir.

Q. Is one of them a red light? A. Yes, sir.

Q. And is the other just a plain light?

A. Yes, sir.

(Testimony of J. W. Orby Nation.)

Q. And do you have those facing back from your truck? You did, did you not? A. Yes, sir.

Q. That red light is on a swivel, isn't it?

A. Yes, sir.

Q. And it could be turned around facing frontward, couldn't it?

A. Yes; you could do it with a wrench.

Q. With a wrench you could turn that light around facing frontward rather than backward?

A. Yes, sir. [71]

Q. But you didn't do that? A. No, sir.

Q. And you didn't do it with the white light either? A. No, sir.

Q. Now, then, you continued to watch this car approach you, did you not? A. Yes, sir.

Q. And I take it you paid particular attention to the traffic? A. Yes, sir.

Q. And I take it that you recognized that, being out there in the position that you were, that you were creating a hazard, and, therefore, should pay particular attention, right?

A. I wouldn't say that I was creating a hazard.

Q. Well, you felt that you had best keep yourself in a position to warn anybody approaching, because of the job that you were doing there in pulling the truck forward, and because of your position on the highway, that is correct? A. Yes, sir.

Q. Now, would you describe the course of this car as it continued to approach?

A. The course of it? [72]

Q. Yes. Did it weave to left or right, or just come right down the highway?

(Testimony of J. W. Orby Nation.)

A. Just came right straight down.

Q. And how far away from you was it when you formed an opinion as to its speed?

A. I would say probably half a mile.

Q. Half a mile? A. Yes.

Q. And what was your opinion as you formed it at that time?

A. Well, I could hear the tires screaming on the highway like it was running fast, the wind of it.

Q. Did you base it upon hearing the tires on the highway? Did you form an opinion as to its speed?

A. I had an opinion in my mind, yes, sir.

Q. And what was that opinion?

A. I would say he was running around 100 miles an hour.

Q. All right. Not a little faster than that?

A. Probably could have been.

Q. All right; then, about half a mile away, you observed this car approaching at a speed of 100 miles an hour or better, correct?

A. No; I wouldn't say "or better." I would say around a hundred. [73]

Q. All right, 100 miles an hour. What did you do at that time?

A. I started blinking my headlights on and off.

Q. Did you blow your horn? A. No, sir.

Q. And that is the first time that you put on the headlights, is that correct? A. Yes, sir.

Q. In other words, the first time you put on the headlights after commencing your attempt to move

(Testimony of J. W. Orby Nation.)

the truck rearward? A. Yes, sir.

Q. Your truck was sideswiped on the right-hand side by this Buick, was it not? A. Yes.

Q. And as I understand it, it was in approximately the position that you have indicated on Exhibits 13 and 14 at the moment it was sideswiped, right? A. Yes.

Q. In other words, with your right front wheels about three feet from the white line, correct?

A. Yes.

Q. Therefore, it is a fair statement, is it not, to say that from the time you observed this car approaching you a half a mile away at 100 [74] miles an hour, you made no attempt of any kind or character to back up your tow truck off the highway, did you? A. No, sir.

The Court: It is 12:00 o'clock now. We will suspend until 1:00 o'clock.

(Thereupon, at 12:00 o'clock noon a recess was taken until 1:00 o'clock p.m. of the same day.) [75]

J. W. ORBY NATION

resumed the stand and testified as follows:

The Court: You may proceed.

Examination
(Continued)

By Mr. McCormick:

Q. Mr. Nation, as I recall it, just before the noon recess you had testified that your tow truck

(Testimony of J. W. Orby Nation.)

was in the position as indicated by you on Plaintiff's Exhibit 13, and you had observed the approach of the Buick car about a half a mile away, and fixed its speed at that time at 100 miles an hour, approximately, is that correct? A. Yes, sir.

Q. And directing your attention to Plaintiff's Exhibit Number 9, which is a view of your pick-up truck, what is the over-all length of your truck, to the best of your estimation? What would you say? About fifteen feet?

A. Probably fifteen to eighteen feet.

Q. Fifteen to eighteen feet. All right. And do I recall your testimony that there was about thirty feet of cable separating you and the rear end of the trailer, right? A. Yes, sir.

Q. Now, it was at that point when you observed this car coming at 100 miles an hour, about [77] half a mile away, that you commenced to flash your headlights on and off, right? A. Yes, sir.

Q. And I take it the reason you did that was that you felt that you should try to warn him?

A. Yes, sir; he was not slowing up.

Q. He was not slowing up. And I take it from your observation he was completely unaware of the danger he had gotten himself into, right?

A. Yes, sir.

Q. Now, at that time, you were seated behind the steering wheel of your car? A. Yes, sir.

Q. And your motor was running?

A. Yes, sir.

Q. And did you continue to blink your lights?

(Testimony of J. W. Orby Nation.)

A. Yes, sir.

Q. And blinked them right up until the impact with your tow truck?

A. Blinked them until just before the impact.

Q. I see. Now, then, how much time elapsed between the time that you first started blinking these lights when you saw this car half a mile away until the impact with your tow truck?

A. Oh, just a matter of seconds.

Q. Well, what would you say, ten to fifteen [78] seconds, something like that?

A. It was probably a little longer than that. Maybe twenty seconds, or something.

Q. About twenty seconds?

A. It is just a guess, sir.

Q. But it is your estimation? A. Yes, sir.

Q. All right. Now, this flare that you had placed to the east of the point at which this accident occurred, how far to the east did you say you placed it from the rear end of the semi-trailer?

A. About 100 yards.

Q. That would be about 300 feet?

A. Yes.

Q. And off on the shoulder? A. Yes, sir.

Q. And, now, this morning I think you testified that you first saw this car when it was three-quarters of a mile to a mile away?

A. Between a half and three-quarters, I believe.

Q. That was half a mile when you estimated its speed? A. Yes, sir.

Q. As distinguished from three-quarters?

(Testimony of J. W. Orby Nation.)

A. Yes. [79]

Mr. McCormick: I would like marked for identification at this time, if the Court please, a certified copy of the transcript of the Coroner's inquest held upon the bodies of General Grant Greer and Rubby Greer at Yuma, Arizona, December 26, 1952.

The Clerk: Plaintiff's Exhibit Number 20 for identification.

(Said document was marked as Plaintiff's Exhibit Number 20 for identification.)

Q. (By Mr. McCormick): Do you remember being called as a witness at the time of that hearing?

A. Yes, sir.

Mr. McCormick: Counsel, I am going to refer to a question and answer, but my copy of this is not numbered. I believe I can find it, however, on the copy that is marked for identification. Page 17, counsel, on line 9.

Mr. Henderson: All right.

Q. (By Mr. McCormick): Would you read, Mr. Nation, page 17, lines 9 to 24? Just read it to yourself. A. Yes.

Q. Now, let me ask you if at the time of that Inquest you were asked these questions and gave these answers: [80]

"Q. Where were you?

"A. Sitting in wrecker.

"Q. How far from wrecker was the Buick when you first saw it?

"A. One hundred fifty yards.

(Testimony of J. W. Orby Nation.)

"Q. Was it on the highway? A. Yes.

"Q. Were its headlights burning? A. Yes.

"Q. Exactly what happened then after you saw it?

"A. I saw it and had time to flash my lights on and off to try to get the attention of the driver.

"Q. What did you do? You turned on your lights?

"A. Yes. I jerked them on and off, blinked them."

Did you give those answers to those questions at that time and place? A. Yes, sir.

Q. In other words, at the Coroner's Inquest you testified that you first saw this Buick when it was 150 yards from you, is that right?

A. I guess I did, sir.

Q. And in giving this testimony, when you [81] referred to "flashing my lights on and off," you were referring to your headlights, were you not?

A. Yes, sir.

Q. And that was the first time you ever pulled on your headlights, correct? A. Yes, sir.

Q. Now, this car didn't change its direction from the time you first saw it, did it?

A. Well, it had to come around this little curve, I guess.

Q. I appreciate that, but I mean as far as any violent moves left or right? A. No, sir.

Q. The only change in direction was its coming around this curve? A. Yes, sir.

Q. And this accident happened on a curve,

(Testimony of J. W. Orby Nation.)

didn't it? A. A slight curve, yes.

Q. And you saw no increase or decrease in its speed, did you? A. No, sir.

Q. How much time elapsed, Mr. Nation, from the time you first arrived at the scene of this accident and set out your flares until the accident occurred? A. Probably fifteen minutes. [82]

Q. Could it have been as much as twenty minutes? A. I don't think so, sir.

Q. All right; now, then, the impact between the Buick and your tow truck was to his right side and your left side, that is correct, isn't it? A. No.

Q. Well, let me put it this way: The impact was between the driver's side of the Buick and the driver's side of your tow car? A. Yes, sir.

Q. In other words, his driver's side sideswiped your driver's side? A. Yes, sir.

Q. And then went into the rear of the trailer?

A. Yes, sir.

Q. All right. One thing more. The only wheel that was not on the westbound lane proper at the time of this impact, of your equipment, was the left rear wheel? A. Yes, sir.

Q. And the other three wheels were entirely on the westbound lane? A. Yes, sir.

Q. The Buick would be coming up a slight hill, would it not, just prior to this impact? [83]

A. Yes, sir.

Q. And, by the way, as you were towing this, or attempting to tow this semi, in order to get around

(Testimony of J. W. Orby Nation.)

you, a car would have had to have crossed over into what would be the eastbound lane, would it not?

A. Yes, sir.

Q. Across the white line? A. Yes, sir.

Q. So that actually you were facing more east than south in the westbound lane?

A. Yes, sir.

Mr. McCormick: I think that is all.

Mr. Henderson: No questions.

The Court: You are excused.

(Witness excused.)

Mr. McCormick: Your Honor, I observe Officer Cochran is still here. As far as I am concerned, he may be excused, unless the other side wants him to remain.

Mr. Henderson: If the Court please, I would like to have him retained as a witness.

The Court: All right.

Mr. McCormick: Mr. Evans, will you take the stand, please? [84]

LONDON EVANS

called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Berkley:

Q. Will you state your name, please?

A. London Evans.

Q. And you are the administrator of the estate,

(Testimony of London Evans.)

are you? A. I am.

Q. And you are the plaintiff bringing this action? A. I am.

Q. Where do you live, Mr. Evans?

A. I live at 54th in North Oakland. I haven't been moved long.

Q. Who do you live there with?

A. I own the place.

Q. That is, in Oakland? A. Oakland.

Q. With your wife? A. Yes.

Q. Do you have any children?

A. I have seven of them.

Q. Are you the guardian of the seven children that were left as the result of the death of the [85] mother and father? A. Yes, sir.

Q. Where are they living?

A. 1614 Ward Street, Berkeley.

Q. Can you give us the names of those seven children?

A. The oldest one is General Greer, Junior. And the other one is Charles.

Mr. Henderson: I don't know that this is material, under our measure of damages. I have no objections to it.

The Court: I don't know as it really is necessary. I read the depositions of this man while you were marking the photographs. I don't know whether I should have or not.

Go ahead. [86]

Mr. McCormick: We may be in error, your Honor, but our position was this, that insofar as

(Testimony of London Evans.)

the measure of damages for the loss of the father and mother are concerned, that the number of children, we realize, is not pertinent——

The Court: No.

Mr. McCormick: ——except we thought perhaps the manner in which the wife occupied her time and contributed to the community earnings would be pertinent to this.

The Court: The Court always finds out those things. Go ahead.

Q. (By Mr. Berkley): You are now taking care of these children, aren't you, Mr. Evans?

A. I am.

Q. Did you tell me where they lived?

A. 1614 Ward Street, Berkeley.

Q. Do you have someone taking care of them?

A. I do have.

Q. Who is that lady? A. Mrs. Underwood.

Q. Are you paying her for taking care of the children? A. I am.

Q. How much do you pay her? [87]

A. She wanted $200 a month, but she is serving for $108 in cash, and the other is considered her board and room.

Q. Is she the only one living with the children?

A. She is the only one.

Q. And she stays there 24 hours a day?

A. Twenty-four hours a day.

Q. Does the Estate receive any money from the county to take care of the children?

A. Sixty dollars.

(Testimony of London Evans.)

Q. Is there any other source of income that comes into the family?

A. There is. The V.A., the Veterans Association pays them $80, and the Social Security pays them $70.

Q. Are there any other moneys that are coming in to help support them at this time?

A. Not any more than what I pay myself.

Q. Now, you have been handling their Estate now for approximately twelve or thirteen months, haven't you? A. I have.

Q. And during that time you have had a chance to observe and keep track of the expenses it takes to take care of these seven children, isn't that [88] correct? A. That is correct.

Q. Can you give me what it costs the Estate to take care of the seven children, for their food and clothing, a month?

A. Well, the actual cost, it has been running $300 a month.

Q. That is for food?

A. Food and clothing.

Q. This house they are living in, do they own it?

A. No; they don't own it. They are buying it.

Q. Let me ask you this question, Mr. Evans: Did your son-in-law and your daughter, did they own a home at the time of their death?

A. No, they didn't.

Q. Were they buying one?

(Testimony of London Evans.)

A. Well, yes; they had a contract on the way to buy one.

Q. How much had they paid down on this contract? A. Five hundred dollars.

Q. What happened to that money that was deposited after the death of the mother and father?

A. What happened to that money?

Q. Yes; what happened to that $500?

A. Well, that $500 is held to pay that [89] money back that they borrowed.

Q. Has it been necessary for you to make any other contribution other than what you have told the Court here, in order to take care of those children per month?

A. Why, yes. I would always have to put in from $75 to $100 more.

Q. Where does that money come from?

A. I have paid it from my own savings, and from my own work.

Q. What kind of work do you do, Mr. Evans?

A. I am a pipe layer.

Q. What does your family consist of? Who is living with you at your house?

The Court: What does that have to do with it?

Mr. Berkley: I thought, your Honor, there might be some question as to how he could afford to pay additional money.

The Court: There isn't any question. It doesn't have anything to do with this case.

Mr. Berkley: I will withdraw the question.

Q. (By Mr. Berkley): Can you tell me where

(Testimony of London Evans.)

the mother and father were living at the time they died? A. They were living in Richmond.

Q. How old is your daughter? [90]

A. My daughter was thirty-two.

Q. How old was her husband?

A. I think he was thirty-three.

Q. Can you tell me how much Mr. Greer was making at the time of his death, if you know?

A. Well, he was making about $300 a month.

Q. How do you arrive at that? What was his occupation?

A. His real occupation was a minister.

Q. Was he working at that full time at the time of his death?

A. Oh, yes; the full time at the time of his death.

Q. Where was his church?

A. Well, he really didn't have a church. He had a tent church. He carried on his services in a tent.

Q. Where was that located?

A. That was located on the Bay Shore.

Q. Do you know how many meetings a week he ran? A. About four or five, mostly five.

Q. Did you ever attend any of them?

A. Oh, yes; about two or three times a week.

Q. How was he paid?

A. Well, he was paid from the money that [91] he collected from his congregation.

Q. Did you have any idea, or do you have any idea how much money he collected from his congregation?

(Testimony of London Evans.)

A. Well, the nights that I were there, twenty-five and thirty dollars each night, except the week-end nights, like Saturday night, or Sunday, he would get around forty-five or fifty dollars and better.

Q. And did he receive his money out of the money that he collected?

A. That is right; out of the money that he collected.

Q. Do you know how long he had been preaching?

A. Well, I really don't know how long, but I think he had been preaching ever since he was quite a kid.

Q. When he married your daughter, was he preaching at that time?

A. He was a preacher then.

Q. And did he preach continually from the time that he married her until the date of his death?

A. Yes, continually.

Q. Now, General Greer and Rubby lived together all during the time of their marriage, didn't they? A. All during the time. [92]

Q. They never were separated?

A. No; never were separated.

Q. They lived part of that time in Detroit?

A. Yes, they lived part of that time in Detroit.

Q. And then they had come back to California to live? A. That is right.

Q. What was the condition of your daughter's health? Was she a healthy girl?

A. Yes; she was healthy.

(Testimony of London Evans.)

Q. Had she been in any accidents before?

A. No; she had never been in an accident.

Q. What was General's health?

A. His health was good, too.

Q. Was he the sole support of the children?

A. He was.

Q. Did you ever make any contribution to him in order to help him take care of his children?

A. No; I never did.

Q. Do you know whether or not he received any help from anybody else?

A. Not that I know of.

Q. As far as you know, then, he was the sole support of the children and his wife?

A. That is right. [93]

Q. All during the time of their marriage?

A. All during the time of his marriage.

Q. Did Rubby help him in his church work at all? A. She did.

Q. What did she do?

A. Well, she was kind of a secretary, like, and sung in the choir, and sometimes with the music.

Q. Her main job was work taking care of the children?

A. Yes; taking care of the children.

Q. Did she have anybody helping her take care of the children?

A. Well, at that particular time to run the meetings, they would bring the kids over to my place, and then sometimes we would go to church with them.

(Testimony of London Evans.)

Q. But she didn't have any outside person to come in that she was paying to help take care of the children?

A. Why, she paid this lady for a few nights, but I don't know how many—Mrs. Underwood.

Q. Now, when she left on her trip going to Detroit, did she leave someone in charge of the [94] children? A. She did.

Q. And who was that?

A. That was Mrs. Underwood.

Q. Where were they living at that time?

A. In Richmond.

Q. Was that in the house they had made a down payment on? A. That is right.

Q. You remember, don't you, Mr. Evans, when your son-in-law and your daughter left on a trip going to Detroit? A. I do.

Q. Do you know the date that they left?

A. Yes. I said it was the 10th day of December, 1952.

Q. How do you know that that is the date they left?

A. Because I sent back to Little Rock and got a duplicate of the license.

Q. I said, how do you know that the date they left going to——

A. Oh, the date they left. That is the day Mrs. Underwood taken the children over.

Q. And Mrs. Underwood is the lady now that is taking care of the children?

A. The same lady now. [95]

(Testimony of London Evans.)

Mr. Berkley: That is all.

Mr. Webster: Your Honor, I would like at this time to read into the record the life expectancy based on the Mortality Tables, shown in Volume 6 of the Arizona Code Annotated.

I believe London Evans' testimony here is that the wife was 32 years of age, and her life expectancy under the Actuaries Combined Experience would be 33.01 years. American Experience Table, 33.93 years. And Carlisle, 33.03.

And I believe London Evans' testimony as to the age of General Greer was 33 years, and the life expectancy would be 32.30, 33.21, and 32.36 years for these same ratings.

Mr. Berkley: No further questions.

Cross-Examination

By Mr. Henderson:

Q. Mr. Evans, this $500 down payment on the home that you mentioned, as a matter of fact, that was refunded, was it not, after the death?

A. It was.

Q. Now, did General Grant Greer operate this church by himself, or were there other ministers working with him?

A. Well, there were other ministers would [96] pay him visits, the ministers that he was preaching at their churches before he started to establish his church.

Q. Did he return those visits to their church?

(Testimony of London Evans.)

A. Yes; he would return them.

Q. Then at the date of the death of his daughter and son-in-law, they did not own any real property whatsoever?

A. No; they didn't own any property.

Q. Did they have any bank accounts?

A. No bank accounts that I know of.

Q. Did they have any insurance policies?

A. Not that I know of.

Q. Did they have any property of any kind other than personal effects, such as clothes?

A. You mean in the household?

Q. Yes; any kind of property.

A. Well, they had some, like a frigidaire, a washing machine, and odd pieces like that.

Q. Did they own the automobile they were driving at the time of this accident?

A. No; it was owned by the church.

Q. Now, following the accident, did you go to Yuma, Arizona, on the 23rd or 24th of December, for the purpose of attending an Inquest?

A. I did. [97]

Q. And did you testify as a witness at that Inquest? A. I did.

Mr. McCormick: I would be willing to stipulate with counsel, if the Court please, that the entire transcript of the Inquest go into evidence, if you are willing.

Mr. Henderson: Yes; I would be willing to so stipulate.

Mr. McCormick: Would you mark that, please,

(Testimony of London Evans.)

Mr. Clerk, as Plaintiff's Exhibit the next number?

The Clerk: Plaintiff's Exhibit 20 in evidence.

(Said transcript was received in evidence and marked as Plaintiff's Exhibit Number 20.)

Q. (By Mr. Henderson): I hand you Plaintiff's Exhibit 20 in evidence, and direct your attention to page 13.

Would you begin at line 12, and read through line 19, just to yourself, so you are familiar with it?

A. Yes.

Mr. McCormick: In the interest of time, counsel, if you would like, I would just as soon you would read it to him. I have no objections.

Mr. Henderson: Very well.

Q. (By Mr. Henderson): While you were testifying at [98] that Inquest, were you asked these questions, and did you make these answers——

A. I did.

Q. Let me ask you the questions, first, Mr. Evans. A. All right.

Q. (Reading): "Do you know where the two were coming from?"

Referring to the Greers.

"A. Yes; they were coming from Detroit, Michigan.

"Q. Do you know when they left Detroit?

"A. I could not definitely tell the date. I think they left the State of California to Detroit 16th or 17th of December.

(Testimony of London Evans.)

"Q. How did they go back? A. By car.

"Q. The same car? A. Yes.

"Q. That was about the 16th or 17th of December? A. Yes.

"Q. You do not know when they left [99] Detroit? A. No."

Now, did you make those answers to those questions at the Inquest? A. I did.

Q. And you testified under oath at the Inquest?

A. Yes. I couldn't exactly remember those dates.

Q. You did make those answers to the questions, though, Mr. Evans? A. Yes, I did.

Q. Mr. Evans, I ask you if you recall, following the Inquest, discussing this matter with patrolman Louis Cochran, the questions of the dates of leaving?

A. The dates they was leaving was mentioned by Mr. Cochran, but I told him——

Q. Did you tell him——

Mr. McCormick: Finish your answer.

The Witness: But I told him I was not for sure what dates that they left.

Q. (By Mr. Henderson): And did you tell him that they made the trip from California to Detroit, and back to Yuma in approximately six days? [100]

A. No; I didn't say in approximately six days. I told him that I didn't know exactly when they left, but I didn't think it had been over a week.

Q. Since they left California?

A. A week from the time that they left California, yes.

(Testimony of London Evans.)

Mr. Henderson: No further questions.

Mr. Berkley: That is all.

(Witness excused.)

Mr. McCormick: At this time, if the Court please, as the Plaintiff's Exhibit next in order, we would like to offer in evidence the deposition of Rena Williams, which was taken in the City of Hope, Arkansas, February 5, 1954, by stipulation between counsel.

I take it it will not be necessary to read it into the record.

The Court: No.

The Clerk: Plaintiff's Exhibit 21 in evidence.

(Said deposition of Rena Williams was received in evidence and marked as Plaintiff's Exhibit Number 21.)

Mr. McCormick: The plaintiff will rest, your Honor.

(Plaintiff rests.)

Mr. Henderson: If it please the Court, at [101] this time I would like to move for judgment for the defendant, on the ground that the plaintiff's evidence has shown absolutely no negligence whatsoever on the part of Mr. Nation, or defendant Griffen Buick, Inc.

The evidence has shown that the wrecker was upon the north side of the highway, that it was occupying a part of that side of the highway, that the proper flares had been put out, that adequate

warning was given to all approaching automobiles, and that the actual vehicles themselves were properly lighted.

The evidence, if anything, has shown that whatever negligence there may have been would be very definitely upon the part of the operator of the Buick automobile in traveling at night at an excessive speed, and failure to observe the red warning flares that were put out well in advance of the scene of the accident.

The Court: The motion will be denied. [102]

(Thereupon, the defendants, to maintain the issues on their parts, introduced the following evidence, to wit.)

Mr. Henderson: I would like to call patrolman Cochran to the stand, please.

LOUIS O. COCHRAN

called as a witness in behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Henderson:

Q. You are the same Louis Cochran who has testified before in this case? A. Yes, sir.

Q. Officer Cochran, did you ascertain the license number of the Buick automobile involved in this accident? A. Yes, I did.

Q. What was that license number?

A. It was a 1952 Michigan license, number CR-10-93.

(Testimony of Louis O. Cochran.)

Q. That would be CR-10-93 Michigan, then, for 1952? A. That is correct.

Q. Officer Cochran, did you have a [103] conversation with London Evans following the Inquest into the deaths of the two Greers at Yuma?

A. Yes; I did.

Q. And at that time did you discuss with London Evans the date of the Greers' departure from California? A. Yes; I did.

Q. Did he tell you what that date of departure was?

A. He stated that he wasn't sure of the date, but that he believed it was the 16th or 17th.

Q. Of December? A. Of December.

Q. Now, during your conversation with London Evans, was Arkansas mentioned? A. Yes.

Q. And did he indicate whether or not he had been in contact with Arkansas immediately prior to the accident?

A. I don't recall his exact words on that, but I know he did state that the Greers had returned from Detroit through Hope, Arkansas, and had stopped there with some relatives for one night.

Q. Did he indicate whether or not the Greers had contacted him from Hope, Arkansas?

A. Well, apparently so. I don't believe I [104] questioned him in that regard, but he knew that they had stopped in Hope, Arkansas.

Q. Did he indicate when in regard to the accident that he had received such a communication?

A. I believe that would have been the night of

(Testimony of Louis O. Cochran.)

the 21st. It was a couple of nights before the accident.

Q. Now, Officer Cochran, you stated earlier you had been an Arizona State Highway Patrolman for approximately four years?

A. Four and a half.

Q. You are familiar with the highways of the State, aren't you?

A. To a great extent, yes.

Q. Have you ever driven the road from Yuma to Benson, Arizona? A. Yes.

Q. And do you know how far it is from Yuma to Benson, Arizona?

A. Well, approximately, yes.

Q. Approximately how far is it?

A. I would say about 270 miles.

The Court: How far did you say?

The Witness: Two hundred seventy miles.

Mr. McCormick: Two seven 0?

The Witness: Yes. [105]

Q. (By Mr. Henderson): I show you a State of Arizona road map, and ask you if you would determine the distance from Benson to Yuma, Arizona? A. This chart says 292 miles.

Q. That is from Benson to Yuma?

A. Yes.

Q. How far east of Yuma, Arizona, did the accident occur? A. Seventeen miles.

Q. And that would be 292, and 17, that would be approximately 275 miles from Benson to the scene of the accident? A. Yes.

Mr. Henderson: No further questions.

(Testimony of Louis O. Cochran.)

Cross-Examination

By Mr. McCormick:

Q. Officer, when you had this conversation with London Evans on the day of the Inquest, he told you he wasn't sure of the date that they had left, that is correct, isn't it?

A. Yes; that is correct.

Q. And he didn't specifically state to you that he had received a telephone call from them from Hope, Arkansas, did he? [106]

A. I don't recall him saying anything about a phone call, but I know he did state that they had stopped overnight at Hope.

Q. That is right.

A. On one of the nights coming back from Detroit.

Q. All right. But he didn't say anything specifically about receiving a phone call either from his daughter or son-in-law?

A. I don't recall that.

Q. One question more.

Directing your attention to Plaintiff's Exhibit Number 13, Officer, would that picture portray the area in which you found the skid marks—excuse me, tire marks?

A. This appears to be a little further east than the actual point of impact.

Q. Maybe we can find another photo.

Directing your attention to Plaintiff's Exhibit

(Testimony of Louis O. Cochran.)

19, would that indicate the area in which you found the tire marks?

A. This would indicate more the actual spot where the semi and the Buick were at rest, yes.

Q. Well, then, neither one—on neither of these could you then actually portray the skid marks, I take it, because of the nature of the [107] pictures?

A. That is correct. They are not in the pictures.

Mr. McCormick: No further questions.

The Court: You are excused. You have nothing further?

Mr. Henderson: No, sir.

(Witness excused.)

Mr. Henderson: I would like to call Mr. W. T. Mendenhall.

WILFRED T. MENDENHALL

called as a witness in behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Henderson:

Q. Will you state your name, please?

A. Wilfred T. Mendenhall.

Q. Where do you live, Mr. Mendenhall?

A. Phoenix, Arizona.

Q. What is your present occupation?

A. State Entomologist of Arizona.

Q. How long have you occupied that position, Mr. Mendenhall?

(Testimony of Wilfred T. Mendenhall.)

A. About three months. [108]

Q. And what was your occupation prior to that time?

A. I was the assistant State Entomologist.

Q. What were your duties as assistant State Entomologist?

A. I was supervisor of the Arizona Agricultural Inspection Stations.

Q. And how long did you occupy that position?

A. Since November, 1945.

Q. Approximately six years? A. Yes.

Q. And in such a position, are you familiar with the various checking stations around the State of Arizona? A. The inspection stations, yes.

Q. Inspection stations. And have you ever been in one of the inspection stations as an inspector?

A. Yes.

Q. Are you familiar with the routine in these inspection stations? A. I am.

Q. What is the routine duty of an inspector in those inspection stations?

A. He inspects all vehicles, passenger cars and trucks that enter the State, for agricultural [109] products which might carry insects and diseases.

Q. Is a record kept of each inspection?

A. It is.

Q. There is a record kept of each vehicle passing through the station? A. Yes.

Q. Now, do you know whether or not in December of 1952 there was an inspection station located at Benson, Arizona? A. There was.

(Testimony of Wilfred T. Mendenhall.)

Q. And what automobiles did that inspection station have inspected?

A. All automobiles entering the State by highway 86 or highway 80, and all Arizona automobiles except those local residents of Benson area.

Q. In other words, you would cover the automobiles proceeding in a westerly direction or northwesterly direction into Arizona? A. Yes.

Q. Now, in the course of checking and inspecting these automobiles, is a record kept of each automobile? A. Yes; it is.

Q. What information is kept?

A. The State the license plate shows, the license plate number, the make of the automobile, [110] and any materials which are taken from that automobile, together with the insects, pests, or diseases that are found in the automobile, and the initials of the inspector making the inspection.

Q. Now, are you familiar with what happens to these records after they have been made up in the inspection station? A. Yes, sir.

Q. What does happen to them?

A. They are made in duplicate. They are kept at the inspection station for one week, and then the original copies are sent to the office of the State Entomologist where they are kept on file for at least five years.

Q. And at the present time, are you custodian of those records? A. Yes; I am.

Q. And were records from the Benson checking station for December 23rd, 1952, forwarded to the

(Testimony of Wilfred T. Mendenhall.)

State Entomologist? A. They were.

Q. And do you have those particular records in accordance with the request of the subpoena that was served upon you?

A. I do. I have the one day record, date of December 23rd. [111]

Mr. Henderson: May that be marked for identification, please?

The Clerk: Defendants' Exhibit D for identification.

(Said document was marked Defendants' Exhibit D for identification.)

Q. (By Mr. Henderson): I hand you Defendants' Exhibit D for identification, and ask you what those records are?

A. Those are the records of the automobiles and house trailers inspected at the Benson inspection station on December the 23rd, 1952.

Q. How many pages does that report consist of?

A. The report consists of pages two to eighty-three.

Q. Does that cover the entire day from midnight to midnight?

A. With the exception of page one, which is apparently lost.

Q. Are those pages in order from a timekeeping point?

A. They are from midnight to midnight.

Q. Now, can you identify the time at which each page was begun?

(Testimony of Wilfred T. Mendenhall.)

A. Within reasonable allowance for error.

Q. I ask you to turn to page sixty-one. Do [112] those records indicate whether or not an automobile, Buick automobile, bearing the Michigan license plate CR-10-93, passed through the Benson checking station?

A. There was a Buick automobile, CR-10-93, with what I presume to be "Michigan." The writing is not very good. It is "Mic," but there is not much of an "h" there.

Q. Do you know whether any other states beginning with "M" that have a double letter prefix for 1952 are there?

A. No; offhand I do not, but I can check on that.

Q. Would you do so?

A. No; I think there was no other state beginning with "M" that had a double letter prefix.

Q. Are you able to determine from the records at which time that automobile passed through the Benson checking station?

A. According to the records, it would have passed through the inspection station at Benson shortly after 4:25 p.m.

Q. Now, why do you say shortly after 4:25 p.m.?

A. The sheet number 61 was started at 4:25, and this car bearing license CR-10-93 was the second automobile written on that sheet of [113] twenty automobiles.

Q. What time was sheet number 62 begun?

A. 4:30.

Mr. Henderson: No further questions.

(Testimony of Wilfred T. Mendenhall.)

Cross-Examination

By Mr. McCormick:

Q. Are you able to tell, Officer, the person who compiled this particular report?

A. There were apparently four men working at the time. There were four initials on the same sheet.

Q. Well, but are you able to tell who J. A. would be? A. Yes; J. A., Mr. J. Axtel.

Q. Was he one of your inspectors at that time?

A. He was.

Q. Do you know where he presently is?

A. No; I do not know. He is not in our employ any more. I believe that he is living in the vicinity of Benson, but I am not sure where.

Q. Now, where does it indicate on this sheet the time that it was commenced?

A. Here. Time, 4:25.

Q. Oh, I see. Do you know what inspector would have indicated the time on this sheet? [114]

A. No; I have no way of telling.

Q. Now, you would read from the back on up?

A. Back on up, yes, sir.

Mr. McCormick: I have no further questions.

Mr. Henderson: May the witness be excused, your Honor?

The Court: He may be.

(Witness excused.)

Mr. McCormick: Is this exhibit in evidence?

Mr. Henderson: No; that has not been offered in evidence.

I will call Mr. Nation, please.

J. W. ORBY NATION

called as a witness on behalf of the defendants, having been previously duly sworn, testified as follows.

Direct Examination

By Mr. Henderson:

Q. You are the same J. W. Orby Nation who has testified previously in this case?

A. Yes, sir.

Q. Mr. Nation, as you drove out to the scene of the accident, were you able to see this GMC trailer, tractor and trailer, before you actually pulled up alongside of it? [115] A. Yes, sir.

Q. And from approximately what distance could you see it?

A. Oh, between 150 and 200 yards.

Q. Now, what could you distinguish at that distance?

A. I could just see that there was a big—you could picture it as a tractor and trailer.

Q. Were there any lights on that equipment?

A. No, sir.

Q. After your arrival, were any lights turned on on your equipment? A. Yes, sir.

Q. How long did they remain on, if you know?

A. From the time I got there until the accident.

Q. I believe you testified this morning that when

(Testimony of J. W. Orby Nation.)

you placed these two fusees out along the north edge of the highway both east and west of the truck, that at the same time, or about the same time you also put in place reflectors alongside of these fusees, but off toward the center of the north half of the highway? A. Yes, sir.

Q. And those were approximately the same distance from the disabled equipment as the fusees?

A. Yes, sir. [116]

Q. Now, when you pulled around to the rear of the trailer, and hooked on there, could you describe for us what kind of an operation it is to hook on?

A. Well, you just take the line, and it has a hook on the end of the line, and you just hook it onto a spring or anything.

Q. It is a complicated tie process?

A. No; you just hook the hook.

Q. And at the time you were hooked onto the rear of the trailer, were your two boom lights in operation? A. Yes, sir.

Q. And can you tell us whether or not they were focused on the back of the trailer?

A. They would be, yes, sir. They would be on the back of the trailer.

Q. Now, I believe you testified one was a red and one was a white light? A. Yes, sir.

Q. Do you know how this white light would compare in strength with the headlight of an automobile?

A. It would be probably almost as strong as a headlight.

(Testimony of J. W. Orby Nation.)

Q. And did it at this time light up the back end of the trailer? [117] A. Yes, sir.

Q. You have previously testified that in your opinion when the Buick was at approximately one-half mile distance that you formed an opinion as to the speed of that automobile at approximately 100 miles per hour.

From that point until the Buick reached the tow truck, did you continuously watch the Buick?

A. Yes, sir.

Q. And did anything occur in that interval to make you change your estimate of the speed of the Buick? A. No, sir.

Q. Then your estimate would be that it continued at approximately 100 miles per hour?

A. Yes, sir.

Q. Now, have you had any experience driving a Buick automobile, or driving Buick automobiles at high speeds yourself? A. Yes, sir.

Q. What is that experience?

A. When I was in the station, my job was balancing wheels, and after a wheel balance we used to take them out for a road test and see that the car doesn't shimmy at a high rate of speed. [118] That is the purpose of balancing the wheels.

Q. How fast do you drive these cars on a road test? A. Around 100 miles an hour.

Q. And have you ever noticed a whine or noise similar to the whine you heard from the tires of this Buick while you were road testing?

(Testimony of J. W. Orby Nation.)

A. Yes, sir; whenever you drive them at a high rate of speed, they do whine.

Q. Is that one of the bases for your estimate of speed? A. Yes, sir.

Q. Now, you testified that when the Buick was about a half mile away you flicked your lights on and off until the actual moment of impact.

You also testified that you did not move your equipment. Is there any reason why you did not move that equipment?

A. The reason I didn't move it was because I didn't have the time after I saw that there was trouble.

Q. Didn't you testify there was approximately fifteen seconds in there?

Mr. McCormick: He said twenty.

Q. (By Mr. Henderson): Fifteen to [119] twenty?

A. Within that length of time you couldn't get out and disengage the winch, and then get back in the truck and put it in gear and move it off of the road before the impact.

Q. Was it necessary to disengage that winch before you could move the wrecker?

A. Yes, sir; because the gears will lock up if you don't.

Q. Now, during the time interval between your first getting in place behind the trailer and your hooking onto the rear of it, and the time that this accident occurred, was there any other traffic passing on the highway? A. Yes, sir.

(Testimony of J. W. Orby Nation.)

Q. And did that pass from both directions?

A. Yes, sir.

Q. Approximately how many cars, if you recall, passed you going in a westerly direction?

A. Three or four, anyway.

Q. And did you observe those cars as they approached you from the east? A. Yes, sir.

Q. Did those cars have any change in speed as they approached the flare or the equipment on the highway? A. Yes, sir. [120]

Q. Was your truck in the same position when those cars passed as it was when the accident occurred? A. Yes, sir.

Q. And didn't those cars give way at all to go by you? A. Yes, sir.

Q. Did they slacken their speed?

A. Yes, sir.

Q. Were there any of them that did not, other than the Greer Buick? A. No.

Q. Now, immediately before the impact between the Buick and your pick-up, could you see the flare that had been placed along the north side of the highway? A. Yes, sir.

Q. And could you see the reflector that was placed there approximately the middle of the north lane? A. Yes, sir.

Q. Both of them were visible to you from your seat in the cab? A. Yes, sir.

Q. Now, did anyone stop at the scene of the accident immediately afterward? [121]

A. Yes, sir.

(Testimony of J. W. Orby Nation.)

Q. And how many cars stopped within the next few minutes?

A. There was two cars and a truck, that I remember.

Q. Traffic was fairly heavy that night, then?

A. Yes, sir.

Q. And did one of those cars go for the highway patrolman? A. Yes, sir.

Q. And was there a colored sailor man driving one of those cars? A. Yes, sir.

Q. And did he stop and make any comment regarding the Buick?

Mr. McCormick: I will object to this question, your Honor, on the grounds that it calls for a hearsay answer, unless it could be shown that the comment he made was made in the presence of the plaintiffs. Certainly, it would be purely hearsay.

Mr. Henderson: If the Court please, of course we can't show it was made in the presence of the plaintiffs.

I would like to make an offer of proof on it, as to what would be shown. I maintain it [122] comes under the res gestae rule.

Mr. McCormick: Well, I do not believe it does, your Honor, particularly when apparently the man isn't even identified by name, just a colored sailor.

The Court: I thought he was present.

Mr. McCormick: No, sir; he was not.

The Court: He wasn't present? I never heard of that.

Mr. Henderson: You lost me a little bit there.

(Testimony of J. W. Orby Nation.)

The Court: I thought the witness was present. I never heard of somebody coming up on an accident and making a comment that would be admissible. I made a comment when I saw those photographs today. It was inaudible.

Mr. Henderson: I would like to make proof at this time.

The Court: Go ahead.

Mr. Henderson: What is the Court's ruling?

The Court: Go ahead.

Q. (By Mr. Henderson): What did the driver of the automobile say?

A. He said that the Buick was the automobile that had passed him down the road, and he was driving approximately 70 miles an hour, and that the Buick passed him like he was standing [123] still.

Q. About how long after the actual impact did this conversation take place?

A. Just a matter of minutes, probably five minutes, or something.

Q. Now, did you ask him about it?

A. No.

Q. Did he make the comment voluntarily?

A. Yes, sir.

Mr. Henderson: No further questions.

(Testimony of J. W. Orby Nation.)

Cross-Examination

By Mr. McCormick:

Q. This colored sailor that came up and mentioned something, this was how long after the accident?

A. Probably about five minutes, or something.

Q. Had you ever seen him before?

A. No, sir.

Q. Ever seen him since? A. No, sir.

Q. Did he say how far down the road he was passed? A. No, sir.

Q. Did you bother to take his name?

A. No, sir.

Q. Now, when you observed this car half a [124] mile away, you were sitting inside your cab, were you not? A. Yes, sir.

Q. And your motor was running?

A. Yes, sir.

Q. Your winch was running? A. Yes, sir.

Q. Does that make a noise?

A. It makes a little noise, yes, sir.

Q. And it is your testimony that you could hear the sound from the tires of this Buick from that distance? A. Yes, sir.

Q. You appreciate that half a mile is 2,640 feet?

A. I hadn't figured it out, but I guess it is right.

Q. 5,280 feet, one half of that.

And then you continued from when you observed that car at that distance, you having formed the

(Testimony of J. W. Orby Nation.)

opinion he was going about 100 miles an hour, and you continued to watch, didn't you?

A. Yes, sir.

Q. And continued to blink your lights?

A. Yes, sir.

Q. Now, is it your testimony that as long [125] as your winch is running you can't back your vehicle? A. Yes, sir.

Q. Under any circumstances?

A. You can back it, but it might not go over but just a little ways before the gears would gum up on it, because the power take-off is from the transmission.

Q. Actually, you can back it up, and the only effect is that your cable slacks?

A. No; the gears lock up, and it just locks the back wheels.

Q. How do you disengage the winch?

A. You can stop it from winching by pushing your foot on the clutch, or at the rear. It has a lever on the clutch, and then another lever there to disengage the winch.

Q. Actually, you can disengage the winch by putting your foot on the clutch?

A. I can disengage it, but I can't stop it. I can disengage it.

Q. All right. That is the lever, right? (Indicating on photograph.)

A. Yes, sir. There are two of them.

Q. On the left rear, and all you have to do is give them a push with your hand, right?

(Testimony of J. W. Orby Nation.)

A. One of them, you pull up to release the [126] clutch, and then just work the other lever in or out again.

Q. All you have to do is go back and work those levers? A. That is right.

Q. And that would freeze the winch?

A. That is right.

Q. And your estimation of the time that elapsed from the time that you first noticed this danger until this accident occurred was approximately twenty seconds? A. Somewhere around there, yes.

Q. It could have been a little more, right?

A. Could have been; I am not sure.

Q. So that I understand you, having watched the Buick approach all the time when it was, say, oh, 2,300 feet away, you still saw it, or you saw it still going a hundred miles an hour, right?

A. Right.

Q. And the same when it was 2,000 feet away?

A. Yes, sir.

Q. And 1,700 feet away?

A. I didn't see any change at all.

Q. So from the entire time you saw it, you observed it constantly, and until the time it approached you, you observed it was not [127] changing its speed in any way, correct?

A. That is right, sir.

The Court: We will have a brief recess at this time.

(Recess.)

(Testimony of J. W. Orby Nation.)

The Court: You may proceed.

Mr. McCormick: I have no further questions of this witness, your Honor.

Mr. Henderson: I have one or two, your Honor.

Redirect Examination

By Mr. Henderson:

Q. Mr. Nation, as you watched the Buick approach you, did you leave your winch motor engaged?

A. I stopped the winch, but the motor of the truck that operates the winch, it was still idling.

Q. And when you stopped that motor, then did the noise die down from that motor?

A. From the winch, yes, sir.

Q. And was it before or after that time that you heard the noise of these tires?

A. I heard them before and after.

Q. Now, you indicated that on your first arrival at the scene of the accident, you put out flares along the highway.

Subsequent to that time, did you put out [128] additional flares?

A. You mean after the accident?

Q. At any time. A. Yes, sir.

Q. And did anyone else put out additional flares?

A. You mean after the accident?

Q. At any time. A. Yes, sir.

Q. And did anyone else put out additional flares?

A. Yes, sir.

(Testimony of J. W. Orby Nation.)

Q. When did they put out these additional flares?

A. We put some out right after the accident. We put more out, and then we put—from then on until the highway patrolman got there, we kept them out, and then the highway patrol took over after he was there.

Q. Were these additional flares located at the approximate position where the two flares you first put out were? A. Yes.

Mr. Henderson: No further questions.

Mr. McCormick: I have no questions.

(Witness is excused.) [129]

Mr. McCormick: I would like at this time, your Honor, to offer in evidence the original deposition of the defendant, J. W. Orby Nation.

Mr. Henderson: We have no objection.

The Court: Very well.

The Clerk: The depositions will be Plaintiff's Exhibit Number 22 in evidence.

(Said deposition was received in evidence and marked Plaintiff's Exhibit 22.)

Mr. McCormick: I wonder, counsel, if you would stipulate at this time that the approximate mileage from Hope, Arkansas, to the scene of the accident is 1,390 miles?

Mr. Henderson: On the basis of give or take twenty miles?

Mr. McCormick: Yes.

Mr. Henderson: That would make it about 1,410.

Mr. McCormick: All right, let us split it and make it 1,410.

Mr. Henderson: Mr. McCormick, I wonder if you would be willing to stipulate at this time that the period of five and three-quarters hours for traveling 274 miles would make an approximate speed of 47.65 miles per hour?

Mr. McCormick: We figured it 46, but 46 or 47, that is close enough. [130]

Mr. Henderson: Defendant rests, your Honor.

(Defendant rests.)

Mr. McCormick: I am willing to submit the case, but I would like to have about two minutes to sum up our position, if your Honor please.

The Court: All right.

(Thereupon counsel for plaintiffs and counsel for defendants presented argument to the court.)

The Court: Is that all?

Mr. McCormick: Yes, sir.

Mr. Henderson: Yes, sir.

The Court: All right. You may prepare your memorandum. I suppose you want time to reply to it?

Mr. Henderson: We should appreciate it.

Mr. McCormick: I would like to have the testimony of the witness Nation written up.

The Court: Ten days after receipt of the transcript, and you may have five or ten days.

Let the record show the case is submitted.

(Which was all of the evidence offered or received on the hearing of the above-entitled matter.) [131]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 29th day of December, A.D. 1954.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona,

do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case No. Civ-1921 Phoenix, London Evans, Administrator of the Estate of General Grant Greer, Jr., deceased, Plaintiff, vs. Griffen Buick, Inc., an Arizona Corporation, and J. W. Nation, Defendants, and case No. Civ-1922 Phoenix, London Evans, Administrator of the Estate of Rubby Greer, deceased, Plaintiff, vs. Griffen Buick, Inc., an Arizona Corporation, and J. W. Nation, Defendants, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said cases, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, constitute the record on appeal in said cases as designated in the Appellants' Designation filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Complaint (Civ-1921 Phx.).
2. Complaint (Civ-1922 Phx.).
3. Defendants' Motion to Strike (Civ-1921 Phx.).

4. Defendants' Motion to Strike (Civ-1922 Phx.).

5. Order of September 21, 1953, granting Defendants' Motion to Strike (Civ-1921 Phx. and Civ-1922 Phx.).

6. Answer (Civ-1921 Phx.).

7. Answer (Civ-1922 Phx.).

8. Order of February 10, 1954, on Stipulation, Waiving Jury Trial (Civ-1921 Phx. and Civ-1922 Phx.).

9. Reporter's Transcript of Proceedings (Civ-1921 Phx. and Civ-1922 Phx.).

10. Order on trial Denying Defendants' Motion for Judgment (pages 101-102 Reporter's Transcript of Proceedings).

11. Plaintiff's Exhibits 1 through 21, inclusive.

12. Defendants' Exhibits A, B and C.

13. Order for Judgment, dated August 24, 1954, and filed August 27, 1954 (Civ-1921 Phx. and Civ-1922 Phx.).

14. Findings of Fact and Conclusions of Law (Civ-1921 Phx.).

15. Findings of Fact and Conclusions of Law (Civ-1922 Phx.).

16. Judgment for Plaintiff (designated as Order of October 18, 1954, for Judgment for Plaintiff), (Civ-1921 Phx.).

17. Judgment for Plaintiff (designated as Order of October 18, 1954, for Judgment for Plaintiff), (Civ-1922 Phx.).

18. Defendants' Objections and Exceptions to

Findings of Fact and Conclusions of Law and Judgment (Civ-1921 Phx.).

19. Defendants' Objections and Exceptions to Findings of Fact and Conclusions of Law and Judgment (Civ-1922 Phx.).

20. Motion for New Trial (Civ-1921 Phx. and Civ-1922 Phx.).

21. Order of February 21, 1955, that Defendants' Motion for New Trial be considered as a Motion to Set Aside Findings of Fact, Conclusions of Law and Judgments, and to enter Judgments for Defendants, or, in the Alternative, for a New Trial; and Order Denying said motion (Civ-1921 Phx. and Civ-1922 Phx.).

22. Notice of Appeal (Civ-1921 Phx.).

23. Notice of Appeal (Civ-1922 Phx.).

24. Supersedeas Bond on Appeal (Civ-1921 Phx.).

25. Supersedeas Bond on Appeal (Civ-1922 Phx.).

26. Statement of Points Upon Which Appellants Intend to Rely on Appeal (Civ-1921 Phx. and Civ-1922 Phx.).

27. Stipulation for Consolidation of Record on Appeal (Civ-1921 Phx. and Civ-1922 Phx.).

28. Designation of Contents of Record on Appeal (Civ-1921 Phx. and Civ-1922 Phx.).

29. Order Extending Time to File Record on Appeal and Docket Appeals (Civ-1921 Phx. and Civ-1922 Phx.).

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to

the sum of $3.20 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 27th day of April, 1955.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 14749. United States Court of Appeals for the Ninth Circuit. Griffen Buick, Inc., a Corporation, and J. W. Nation, Appellants, vs. London Evans, Administrator of the Estate of General Grant Greer, Jr., Deceased, Appellee. Griffen Buick. Inc., a Corporation, and J. W. Nation, Appellants, vs. London Evans, Administrator of the Estate of Rubby Greer, Deceased, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed April 29, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14749

LONDON EVANS, Administrator of the Estate of GENERAL GRANT GREER, JR., Deceased,

Plaintiff,

vs.

GRIFFEN BUICK, INC., an Arizona Corporation, and J. W. NATION,

Defendants.

STATEMENT OF POINTS

Come now Griffen Buick, Inc., and J. W. Nation, Defendants and Appellants herein, and state that they and each of them rely upon appeal upon the points set forth in their "Statement of Points Upon Which Appellants Intend to Rely Upon Appeal," filed in the United States District Court for the District of Arizona, in consolidated cases Civil 1921, Phoenix, and Civil 1922, Phoenix.

Dated at Phoenix, Arizona, this 30th day of April, 1955.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

By /s/ JAMES F. HENDERSON,
Attorneys for Defendants and Appellants.

Service of copy acknowledged.

[Endorsed]: Filed May 3, 1955.

No. 14749

IN THE

United States
Court of Appeals
For the Ninth Circuit

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION, *Appellants*,

vs.

LONDON EVANS, Administrator of the Estate of GENERAL GRANT GREER, JR., *Appellee*.

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION, *Appellants*,

vs.

LONDON EVANS, Administrator of the Estate of RUBBY GREER, Deceased,

Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLANTS.

GUST, ROSENFELD, DIVELBESS & ROBINETTE,

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INDEX

	Page
Appendix	36-39
Argument	14-34
No. I	14-20
No. II	20-26
No. III	27-31
No. IV	31-34
Conclusion	34-35
Jurisdiction	2- 3
Preliminary Statement	2
Specifications of Error	9-13
Statement of the Case	3- 9

Page

BENTON vs. THOMPSON (Mo.)
156 S.W. 2d 739 33

BERGER-McNAIR vs.
94 Mont. 441; 15 P. 2d, 834 .....14, 22

BILLAR-KRAUTH vs.
71 Ariz. 298; 226 P. 2d, 1012 .....23, 25

BOWMASTER vs. WILLIAM H. DePREE CO.
258 Mich. 538; 242 N.W. 744 .....14, 16, 18

BURBA-GREENWELL'S ADMINISTRATOR vs.
298 Ky. 255; 182 S.W. 2d, 436 32

BUTANE CORPORATION vs. KIRBY
66 Ariz. 272; 187 P. 2d, 325, 334 23

COOPER vs. TETER
123 W. Va. 372; 15 S.E. 2d, 152, 153.....14, 16

COTE-SPANG vs.
68 Atl. 2d, 823 .....24, 29

DENEVAN-PETERSON vs. (C.C.A. 8th)
177 Fed. 2d, 411, 412 26

DePREE, WILLIAM H-BOWMASTER vs.
258 Mich. 538; 242 N.W. 744 ..... 14, 16, 18

DIETZ vs. MORRIS (Me.)
98 Atl. 2d, 537 30

EVERETT, City of-MOREHOUSE vs.
141 Wash. 399; 255 P. 157, 160; 58 ALR 1482 23

FRANCO vs. VAKARES
35 Ariz. 309; 277 P. 812 33

FRIEDMAN vs. FRIEDMAN
40 Ariz. 96; 9 P. 2d, 1015 33

GREENWELL'S ADMINISTRATOR vs. BURBA
298 Ky. 255; 182 S.W. 2d, 436 32

Page

HENRY vs. S. LIEBOVITZ & SONS
312 Pa. 397; 167 Atl. 304, 305 .....14, 15, 16, 18

HOWELL-OKLAHOMA POWER & WATER CO. vs.
207 P. 2d, 937 14

KASTLER vs. TURES
199 Wisc. 120, 210; N.W. 415, 417 .....14, 15, 16, 18, 22

KIRBY-BUTANE CORPORATION vs.
66 Ariz. 272; 187 P. 2d, 325, 334 23

KRAUTH vs. BILLAR
71 Ariz. 298; 226 P. 2d, 1012 .....23, 25

LEHNERT-ROBINSON vs.
71 Ariz. 454; 229 P. 2d, 708, 709 19

LIEBOVITZ, S. & Sons-HENRY vs.
312 Pa. 397; 167 Atl. 304, 305 .....14, 15, 16, 18

LITTON-SMITH vs.
47 Sou. 2d, 411 22

MOREHOUSE vs. CITY OF EVERETT
141 Wash. 399; 255 P. 157, 160; 58 ALR 1482 23

MORRIS-DEITZ vs. (Me.)
98 Atl. 2d, 537 30

MOTORS INSURANCE CORPORATION vs. RHOTON
72 Ariz. 416; 236 P. 2d, 739 .....16, 24, 27

McNAIR vs. BERGER
94 Mont. 441; 15 P. 2d, 834 .....14, 22

OKLAHOMA POWER & WATER CO. vs. HOWELL
207 P. 2d, 937 14

PETERSON vs. DENEVAN (C.C.A. 8th)
177 Fed. 2d, 411, 412 26

RHOTON-MOTORS INSURANCE CORPORATION vs.
72 Ariz. 416; 236 P. 2d, 739 .....16, 24, 27

Page

ROBINSON vs. LEHNERT
71 Ariz. 454; 229 P. 2d, 708, 709 19

ROCCA vs. TILLIA (Pa.)
162 Atl. 495 32

SPANG vs. COTE
68 Atl. 2d, 823 .....24, 29

SMITH vs. LITTON,
47 Sou. 2d, 411 22

TETER-COOPER vs.
123 W. Va. 372; 15 S.E. 2d, 152, 153 .....14, 16

THOMPSON-BENTON vs. (Mo.)
156 S.W. 2d, 739 33

TILLIA-ROCCA vs. (Pa.)
162 Atl. 495 32

TURES-KASTLER vs.
199 Wisc. 120, 210; N.W. 415, 417 .....14, 15, 16, 18, 22

VAKARES-FRANCO vs.
35 Ariz. 309; 277 P. 812 33

ARIZONA STATUTES CITED

Page

Arizona Code Annotated, 1939, Sec. 66-157a,
Laws 1950 (1st S.S.) Ch. 3, Sec. 107 20

Full text at Appendix 36-37

Arizona Code Annotated, 1939, Sec. 66-182a,
Laws 1950 (1st S.S.) Ch. 3, Sec. 152 17

Full text at Appendix 37-39

Arizona Code Annotated, 1939, Sec. 66-171,
Laws 1950 (1st S.S.) Ch. 3, Sec. 107 .....15, 16

Full text at Appendix 37

Arizona Code Annotated 1939, Sec. 66-185f,
Laws 1950 (1st S.S.) Ch. 3, Sec. 162 14

AUTHORITIES CITED

Restatement of the Law, Torts,
Vol. 11, Sec. 500, page 106 19

Restatement of the Law, Torts,
Sec. 491, page 1273 31

FEDERAL STATUTES CITED

28 U.S.C.A. 1921, C 646, 62 Stat. 929 as amended 3

28 U.S.C.A. 1294, C 646, 62 Stat. 930 as amended 3

28 U.S.C.A. 2107, C 646, 62 Stat. 963 as amended
May 24, 1949 C 139, Secs. 107-108,
63 Stat. 104 3

No. 14749

IN THE

United States
Court of Appeals
For the Ninth Circuit

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION, *Appellants*,

vs.

LONDON EVANS, Administrator of the Estate of GENERAL GRANT GREER, JR., Deceased, *Appellee*.

GRIFFEN BUICK, INC., a Corporation, and J. W. NATION, *Appellants*,

vs.

LONDON EVANS, Administrator of the Estate of RUBBY GREER, Deceased,

No. 14749

BRIEF OF APPELLANTS

In this Brief the parties will be referred to by their designations in the District Court, namely, Appellants as Defendants, and Appellees as Plaintiffs.

Reference to the printed Transcript of Record will be indicated by the letter "T" followed by the page number.

PRELIMINARY STATEMENT

This is a consolidated appeal from two Judgments of the United States District Court for the District of Arizona, rendered by said Court sitting without a Jury, for damages for the death of Plaintiff's Administrator's intestate in each case, which deaths resulted from injuries received in a common accident on a public highway in the State of Arizona, the accident being allegedly caused by the wilful and wanton misconduct and negligence of Defendant J. W. NATION, in the operation of a tow truck owned by Defendant, GRIFFEN BUICK, INC.

JURISDICTION

Plaintiff, a citizen of the State of California, and the duly appointed and acting Administrator of the Estates of GENERAL GRANT GREER, JR., Deceased, and RUBBY GREER, Deceased, respectively (T 3) (T 7) brought this action in the District Court of the United States for the District of Arizona against the Defendants, GRIFFEN BUICK, INC., an Arizona Corporation (T 3, T 7) and J. W. NATION, a citizen and resident of the State of Arizona (T 3, T 7) seeking to recover damages in the sum of Two Hundred Thousand ($200,000.00) Dollars for the death of GENERAL GRANT GREER, JR., Deceased, and in the sum of One Hundred Thousand ($100,000.00) Dollars for the death of RUBBY GREER, Deceased, resulting from injuries alleged to have been sustained in an automobile accident occurring near Yuma, in the State of Arizona.

Defendants entered their appearance in both actions, preliminary matters were heard and disposed of by the District Court; Defendants' Answers were filed and the cases were set for trial without a jury as consolidated cases (T 17).

Trial of the actions was had, the case was submitted, and on August 24, 1954, the Court's Order for Judgment was made, and duly filed and docketed on August 26, 1954 (T 17-18).

Thereafter, on October 18, 1954, Findings of Fact and Conclusions of Law were made and entered (T 18-21) (T 22-25), and judgments were entered in favor of the Plaintiff in each action (T 26-27) (T 27-28).

On October 19, 1954, Defendants' Objections and Exceptions to Findings of Fact and Conclusions of Law and Judgment were filed (T 28-32) (T 33-36) and Defendants' Motion for New Trial filed on October 26, 1954 (T 37). By minute entry of February 21, 1955, the Motion for New Trial was ordered designated as a Motion to Set Aside Findings of Fact and Conclusions of Law and Judgments, in Civ. 1921 and Civ. 1922, and to Enter Judgments for Defendants, Or In The Alternative For a New Trial. The Motion was denied and Execution of Judgment stayed for a ten-day period (T 38).

The Judgment thereupon became final and appeal therefrom to the Circuit Court of Appeals lies under C 646, 62, Stat. 929 as amended, 28 U.S.C.A. 1921, and C 646 Stat. 930 as amended, 28 U.S.C.A. 1294, the general statutes on appeal, and within the time limit allowed by C 646, 62 Stat. 963 as amended May 24, 1949, C 139, Sections 107, 108, 63 Stat. 104, 28 U.S.C.A. 2107. Notice of Appeal and Statement of Points were filed within the time limit (T 39-40) (T 40-43) and the Court's Order extending time for filing record on appeal, and docketing the appeal to and including April 30, 1955, was entered on April 12, 1955 (T 45).

STATEMENT OF THE CASE

At some time between December 10th and December 17th, 1952, GENERAL GRANT GREER, JR., and RUBBY GREER, left Richmond, California, to travel to Michigan via Hope, Arkansas (T 117, 120-121, Plaintiff's Exhibit 20 in Evidence at page 13, lines 12-19). They were driving a 1952 Buick bearing 1952 Michigan license plate CR-10-93 (T 123-124) owned by The United Church of Christ in God, Richmond, California (Plaintiff's Exhibit 20 in Evidence at page

11, lines 8-10). Their return trip was apparently over the same route.

On December 23, 1952, seventeen miles east of Yuma, Arizona, on U. S. Highway 80 (T 49), the Buick was involved in a collision with a semi trailer and with Defendant's GMC tow truck (T 49, 51). The GREERS received injuries from which they died (T 63).

On August 13, 1953, Plaintiff filed Complaints in the United States District Court for the District of Arizona, seeking damages of $200,000.00 together with burial expenses for the Estate of GENERAL GRANT GREER, JR., Deceased, and damages of $100,000.00 together with burial expenses for the Estate of RUBBY GREER, Deceased. There was no claim for property damage. The Complaints alleged that the accident was caused by the negligence of Defendant J. W. NATION, in that he negligently, wilfully, recklessly and wantonly placed and operated Defendant GRIFFEN BUICK, INC.'S tow truck on the highway in such a position and location as to imperil the lives of persons traveling on the highway (T 3-9).

Defendants appeared, and after the respective prayers for burial expenses were stricken on Order of the Court (T 11), filed their Answers admitting the tow truck was owned by GRIFFEN BUICK, INC., and that Defendant NATION was operating it within the scope of his employment for GRIFFEN BUICK, INC. The Answers denied and other material allegations of Plaintiff's Complaint and alleged the accident was due to the negligence of GENERAL GRANT GREER, JR. (T 12-16).

By Stipulation, Jury was waived (T 17) and the cases consolidated and set for trial before the Court without a Jury and came on for trial on February 12, 1954.

The accident occurred at 10:15 o'clock P.M. on a clear, dry night; there was no moon (T 70-71, Plaintiff's Exhibit 20 in Evidence, page 22).

The road at the scene of the accident ran generally east and west. For west bound traffic the road was on a 2% upgrade (T 70) and was a slight curve to the northwest, or the driver's right (T 67-68). Three hundred feet east of the scene, a small knoll was located at the north side of the road (T 66).

There was a semi trailer and tractor located at the scene. This equipment faced west, parallel to and 4 feet north of the north edge of the highway (T 54-56, and see rectangle designated "truck" as drawn on Plaintiff's Exhibit 14 in Evidence). Defendant GRIFFEN BUICK, INC.'S tow truck was located 30 feet east of the rear of the trailer (T 97) angled across the north lane of the highway heading southeast and not directly facing west bound traffic (T 98-99). The left rear wheel of the tow truck was off the north edge of the pavement (T 97, Plaintiff's Exhibit 22 in Evidence, pages 24 and 25) and its right front wheel was 3 feet north of the center line (T 99, and see rectangles marked on Plaintiff's Exhibits 13 and 14 in Evidence). A towing cable extended from the tow truck's boom to the back of the trailer (T 95). On the front of the tow truck, the parking lights were burning (T 97) and on the towing boom were located a red light and a white light (T 97, 100-101, Plaintiff's Exhibits 9, 10, 11 and 12 in Evidence). These boom lights faced the rear and shone on the rear end of the semi trailer (T 134-135). Every light on the tractor and trailer was lighted (T 96, 84-85, and the Plaintiff's Exhibit 1 in Evidence, with rear lights circled).

The lights of these two vehicles would be visible to an approaching west bound driver when he was ¾ of a mile east of the scene and continuously until he reached a point ¼ of a mile from the scene of the accident. From ¼ of a mile to 450 feet from the scene, the driver's view of the semi and tow truck would be obstructed in varying degrees, depending on the distance the car was from the knoll located at the north shoulder. From 450 feet on to the scene of the accident, the driver would have a clear and completely unobstructed view of the tow truck and semi tractor and trailer (T 83-85).

Three hundred feet east of the scene (T 90) and at the point of the knoll (T 66), Defendant NATION placed a red magnesium fusee at the north edge of the highway (T 90-91, 81-82, and see marking designated "flare" on Plaintiff's Exhibits 15, 16 and 18 in Evidence). These fusees are visible for 1½ to 2 miles (T 85) and a west bound car would have a clear view of this particular fusee for ¾ of a mile before reaching the fusee (T 85). This particular fusee was burning immediately prior to the accident (T 137). Defendant NATION also placed a double red glass reflector opposite the fusee and in the approximate center of the north or west bound lane of traffic (T 92). This reflector was visible and in place immediately prior to the time of the accident (T 137).

While the vehicles were in this position and prior to the approach of Decedents' Buick, several west bound cars passed the tow truck and semi trailer, all slowing down and passing on the left hand or south side of the highway (T 137).

Defendant NATION was in the cab of the tow truck when he heard and saw the Buick approaching ¾ of a mile east of the truck (T 95-96). When it was ½ mile distant, Defendant NATION formed the opinion that the Buick was traveling at a speed of around 100 miles per hour (T 102) based on his experience in testing automobiles at high speeds and the time in which the Buick traveled the distance involved (T 135-136).

From this moment on, Defendant NATION could not and did not attempt to move his tow truck for the reason that his winch motor was in operation (T 136). This motor worked off the truck transmission. While it could be disengaged by pushing in on the clutch of the truck, letting the clutch out would engage it again. To drive the truck off the highway, NATION had to get out of the cab, go to the rear of the truck, move one lever up to release the clutch, work a second lever in or out and then return to the cab and put the truck in gear (T 141). If an attempt were made to move the truck without taking the winch motor off the transmission by means of the

levers at the rear of the truck, the gears would lock and lock the rear wheels of the truck (T 142).

At this point NATION began blinking his lights from parking beam to driving beam (T 102). The Buick did not alter its speed or direction at any time up to the moment of the collision (T 101-102). The Buick left no skid marks (T 63). Its tire marks first left the pavement on the north side of the highway when the Buick was 44 feet east of the rear of the trailer (T 99) or about 20 feet east of the tow truck (T 81). When 35 feet east of the trailer, the Buick ran over one of the series of highway reflectors designating the north edge of the pavement on the curve (T 69, 82) (reflector identical to reflector pictured on Plaintiff's Exhibit 18 in Evidence). The Buick then traveled on to strike the left front bumper and sideswipe the left side of the tow truck (T 71-72), and ran on under the rear end of the trailer (T 49). The force of the impact tore the towing boom on the tow truck loose (T 73). It moved the partially loaded tractor and trailer, which was sitting in 8 inches of loose blow sand, (T 72), 2 feet to the west (T 73), sheared five ¾ inch rivets off of the undercarriage on one side of the trailer (T 75 and Defendants' Exhibit A in Evidence), sheared rivets off the undercarriage on the other side of the trailer (Defendants' Exhibit B in Evidence) and knocked the undercarriage loose from the trailer (T 75). The force of the impact also shoved the radiator of the Buick back to its windshield (Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8 in Evidence).

Several cars stopped after the accident. One driver volunteered the comment that the Buick was the same automobile that had passed him down the road and while he was driving 70 miles per hour the Buick passed him like he was standing still (T 139 and Plaintiff's Exhibit 20 in Evidence, page 10, line 19, page 11, line 7).

On direct examination Plaintiff LONDON EVANS first testified that the GREERS had left California enroute to Detroit, Michigan, on December 10, 1952. On cross examination

he admitted that three days after the accident he testified at the inquest at Yuma, Arizona, and that his testimony was to the effect that the GREERS were returning from Detroit and that "I could not definitely tell the date. I think they left the State of California to Detroit the 16th or 17th of December" (T 120-121 and Plaintiff's Exhibit 20 in Evidence, page 13, lines 12 through 19). Plaintiff LONDON EVANS also testified that he held a conversation with Patrolman Cochran following the inquest, at which time he told the Patrolman that while he did not know exactly when decedents left California to go to Detroit, he "did not think it had been over a week" (T 121). This was corroborated by the Patrolman (T 124). The Patrolman also testified that the distance from Benson, Arizona, to the scene of the accident was 275 miles (T 125).

W. T. Mendenhall, Arizona State Entomologist, testified, from the records of the Department's checking station at Benson, Arizona, that a Buick automobile bearing Michigan license CR-10-93 passed through that station between 4:25 and 4:30 P.M. on December 23, 1952 (T 127-131) only 5¾ hours prior to the accident which occurred about 10:15 P.M. of the same date (Plaintiff's Exhibit 20 in Evidence, at page 22), the Buick was apparently averaging a speed of 47.65 miles per hour, mostly after dark, between those two points (T 145).

Although not in the record, we believe the Court can properly take judicial notice of the fact that the most direct paved route from Benson, Arizona, to the scene of the accident passes through Tucson, Picacho, Eloy, Casa Grande and Gila Bend, Arizona, and this route is a State highway, and that the legal speed on a State highway in Arizona is "fifty (50) miles per hour during the nighttime on State highways". (Section 66-157a, par. 4 (b) Arizona Code Annotated, 1939, as amended by Laws 1952 (1st S.S. Ch. 3 of Sec. 56). (for full text see Appendix).

Defendants' Motion for Judgment at the close of Plaintiff's case having been denied (T 122-123), the case was submitted

(T 146). Thereafter the Court entered Findings of Fact and Conclusions of Law and Judgment in favor of Plaintiff in Civil 1921 in the sum of $10,000.00, and in Civil 1922 in the sum of $15,000.00 (T 18, 22, 17), over Objections and Exceptions thereto filed by Defendants (T 28, 33).

Defendants' Motion for New Trial, designated by minute entry (T 38) as a Motion to Set Aside Findings of Fact, Conclusions of Law, Judgment, and to Enter Judgment for Defendants, was duly filed (T 37) and denied (T 38).

SPECIFICATIONS OF ERROR

I.

The Court erred in finding that the motor vehicle in which Plaintiff's Intestates were riding, was being operated in a careful and prudent manner and with due regard for the safety of others on the highway, on the ground and for the reason that there is no evidence that said motor vehicle was being operated in a careful and prudent manner and with due regard for the safety of others on the highway; and for the further reason that all the evidence shows that said vehicle was being operated in a grossly wilful, wanton and negligent manner with deliberate disregard for the safety of others using the highway under the conditions then and there existing.

II.

The Court erred in finding that Defendant-Appellant J. W. NATION, wantonly and wilfully placed said tow car, and caused said tow car to be placed on said highway in such a position and location as to imperil the lives and property of persons traviling in motor vehicles on said highway, on the ground and for the reason that there is no evidence that such placement of the tow car on the highway imperiled the lives and property of persons properly using the highway under the conditions then and there existing.

III.

The Court erred in finding that Defendant-Appellant J. W. NATION, wilfully and wantonly failed and neglected to give and place suitable warnings of the position and location of said tow car, on the ground and for the reason that there was no evidence that Defendant NATION failed to give and place suitable warnings, and on the further ground that all the evidence was that adequate and suitable warnings were given and placed by Defendant NATION.

IV.

The Court erred in finding that said Defendant NATION recklessly and negligently operated, maintained and controlled said tow car, on the ground and for the reason that Defendant J. W. NATION'S only duty was to exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances and all the evidence is that he fulfilled that duty.

V.

The Court erred in finding that the collision and the injuries and death of Plaintiff's Intestates directly and proximately resulted from wilful and wanton misconduct and from recklessness and negligence of Defendent, J. W. NATION, on the ground and for the reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendant J. W. NATION and on the further ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

VI.

The Court erred in finding that the Estates of Plaintiff's Intestates were diminished, depleted and damaged in any sum whatsoever as a direct and proximate result of "said wilful and wanton misconduct, and of said recklessness and negligence on the part of Defendant NATION" on the ground and for the

reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendant J. W. NATION, and on the further ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

VII.

The Court erred in finding that the sole, proximate cause of said collision and of the deaths of Plaintiff's Intestates, and of the damage to the estates thereof, was the "said wilful and wanton misconduct and said recklessness and negligence of said Defendant NATION" on the ground and for the reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendant J. W. NATION and on the further ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

VIII.

The Court erred in finding that at the time and place of said accident, the Plaintiff's Intestate was not guilty of any negligence or want of care which contributed as a proximate cause of said collision or of said deaths or of said damages, on the ground and for the reason that there is no evidence that the driver of the Buick exercised due or any care, and on the further ground that the sole, uncontroverted evidence was that the operator of the Buick was negligent.

IX.

The Court erred in making the conclusion of law that the Plaintiffs were entitled to any judgment whatsoever against the Defendants, GRIFFEN BUICK, INC., and J. W. NATION, jointly and severally in either Civ. 1921 Phoenix, or Civ. 1922 Phoenix, on the ground and for the reason that there is no evidence of wilful and wanton misconduct and no evidence of recklessness and negligence on the part of Defendants J. W. NATION or GRIFFEN BUICK, INC., and on the further

ground that the uncontroverted evidence is that the sole negligence involved was the negligence of the operator of the Buick automobile.

X.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was guilty of contributory negligence, on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick automobile was negligent.

XI.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was guilty of negligence on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick automobile was negligent.

XII.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was guilty of gross, wilful and wanton negligence on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick automobile was negligent, and that his conduct was such that he knew or had reason to know that his conduct created an unreasonable risk of, and involved a high degree of probability that, substantial harm would result to himself and others.

XIII.

The Court erred in failing to find that GENERAL GRANT GREER, JR., deceased, was negligent and that such negligence was imputed to RUBBY GREER on the ground and for the reason that the uncontroverted evidence shows that the driver of the Buick was wilfully, wantonly and grossly negligent and that such negligence was so extreme as to require some action by RUBBY GREER in the interests of her own welfare, and on the further ground that GENERAL GRANT GREER, JR. and RUBBY GREER were engaged in a joint venture.

XIV.

The Court erred in failing to find that Defendant-Appellant J. W. NATION, and therefore Defendant-Appellant GRIFFEN BUICK, INC., was not guilty of any negligence on the ground and for the reason that Defendant GRIFFEN BUICK, INC. could not be guilty of negligence if its employee, Defendant J. W. NATION was not negligent.

XV.

The Court erred in denying Defendants' Motion for Judgment for Defendants on the ground and for the reason that there was no evidence of negligence on the part of Defendants J. W. NATION or GRIFFEN BUICK, INC., and on the further ground that the evidence shows that the operator of the Buick was solely negligent.

XVI.

The Court erred in denying Defendants' Motion to Set Aside Findings of Fact and Conclusions of Law, Judgment and to enter Judgment for Defendants, or in the alternative for a New Trial, on the ground and for the reason that there was no evidence of negligence on the part of Defendants J. W. NATION or GRIFFEN BUICK, INC. and on the further ground that the evidence shows that the operator of the Buick was solely negligent.

XVII.

The Findings of Fact, Conclusions of Law and Judgments are not justified by the evidence and are contrary to the evidence and to the law in both Civ. 1921 and Civ. 1922 Phoenix on the ground and for the reason that there is no evidence of negligence on the part of Defendant J. W. NATION, and that the evidence shows that the operator of the Buick was solely negligent, and on the further ground that there is no evidence to show that the conduct of Defendants, J. W. NATION or GRIFFEN BUICK, INC. caused or in any way contributed to the accident and to the deaths complained of.

ARGUMENT

I.

This Argument is urged in support of Specifications of error Nos. II, III, IV, V, VI, VII, IX, XIV, XV, XVI, XVII.

The negligence of Defendant, J. W. NATION, and consequently the derivative negligence of Defendant GRIFFEN BUICK, INC., must be determined either under the statute or the common law.

There are no statutory restrictions upon the operation of tow cars in the State of Arizona, except for Section 66-185f, Arizona Code Annotated, 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 162, entitled "Trailers and towed vehicles". This Section deals with moving tows and has no applicability here.

The Arizona Supreme Court has not dealt with questions of law involving towing operations.

The general rule is that a wrecker blocking or partially blocking the highway in an effort to extricate a disabled vehicle, is making a necessary and proper use of the highway.

KASTLER vs. *TURES*,
199 Wisc. 120, 210; NW 415, 417.

HENRY vs. *S. LIEBOVITU & SONS*,
312 Pa. 397; 167 Atl. 304, 305.

McNAIR vs. *BERGER*,
94 Mont. 441; 15 P. (2d) 834.

BOWMASTER vs. *WILLIAM H. DePREE CO.*
258 Mich. 538; 242 NW 744.

COOPER vs. TETER,
123 W. Va. 372; 15 SE (2d) 152, 152.

OKLAHOMA POWER N WATER CO. vs. *HOWELL*
201 Okla. 615; 207 P. (2d) 937.

The question then arises as to whether any of the general statutes applicable to the use of the highway are here involved. Plaintiff has urged that Section 66-171 Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 107 entitled "Stopping, standing or parking outside of business or residence district" (see Appendix, page 37 for full context) was violated by Defendant NATION and that such violation constituted negligence.

It has been held that substantially similar statutes had no applicability to a tow car's operation, deeming such operation a use of the highway in an emergency. The Wisconsin Supreme Court in *Kastler* vs. *Tures* (supra), under a similar fact situation, held that the statute applied only to a voluntary act of leaving a car upon the highway when not in use, and stating "this was not such a case. Here there had been an accident. The wrecked car was in the ditch with passengers in it, and the Plaintiff was making a proper and necessary use of the highway under an emergency." In that case, the Plaintiff was the tow truck operator.

The Pennsylvania Supreme Court also construed such a stopping statute in *Henry* vs. *S. Liebovitz & Sons* (supra). The material difference between the Pennsylvania and Arizona statutes was that the Pennsylvania statute required at least 15 feet of the highway to be left unobstructed for the passage of other vehicles, while the Arizona statute specifies only "an unobstructed width of the highway" should be left for the free passage of other vehicles. The *Liebovitz* case involved another towing mission,—to remove a car from the ditch. The paved highway was 18 feet wide and the evidence was in dispute as to whether the tow car obstructed 15½ or 11½ feet of the pavement. The Court there held that such use of the tow car was a lawful use, stating: "If, now, that operation——required the temporary use of more than half the highway during the forward movement, it cannot be said that such operation was within the prohibition——" of the statute.

The Arizona Supreme Court has construed the Arizona statute generally in *Motors Insurance Corporation* vs. *Rhoton*, 72 Ariz. 416; 326 P. (2d) 739, holding there that parking a car on the highway in derogation of the statute was not in itself actionable negligence and could only be so if it were proved that such action was the proximate or contributing cause of the accident. This case did not involve towing operations.

The use made of the highway by Defendant NATION in attempting to tow the semi back on to the highway would not be subject to Section 66-171 Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 107. It is doubly apparent that no negligence of Defendant NATION could be predicated on this statute in view of the express intent of Section (a). It was not only impracticable but impossible for NATION to perform his towing from any position except the position he occupied upon the highway. It being necessary for him to be upon the highway, he was there strictly within the limitations of the statute. An unobstructed width of the highway opposite the tow truck was left for the free passage of other vehicles. This unobstructed portion was 22½ feet of the 30 foot highway (T 64). There was also a clear view of the tow truck and semi for 300 feet to the east. This was in excess of the statutory 200 feet requirement.

Defendants do not contend that NATION had no duties merely because he was operating a towing vehicle. He had a duty to warn travelers on the highway of the presence of the tow truck and semi. This duty would be a common law duty measured by whether or not Defendant NATION used the same care as a reasonably prudent man would use under the same or similar circumstances unless there was some statutory definition of the necessary warnings.

Cooper vs. *Teter* (supra) at page 155.
Bowmaster vs. *William H. DePree Co.* (supra) at page 745.
Kastler vs. *Tures* (supra) at page 417.
Henry vs. *S. Liebovitz & Sons* (supra) at page 305.

Section 66-182a Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 152, entitled "Display of warning devices when vehicle disabled". (see Appendix, page 37 for full text) is inapplicable to the facts here involved. Defendants' tow truck was not "disabled" within the apparent meaning of the statute. This designation becomes immaterial, however, in view of the positive action taken by Defendant NATION to warn the Plaintiffs and others using the highway in the presence of the tow truck and the semi.

Defendant J. W. NATION placed red magnesium fusees not 100 feet away from the tow truck, but 300 feet in each direction from the location of those vehicles (T 90). The eastern fusee was placed at the point of the knoll (T 66) and was visible to approaching west bound vehicles while they were still one-half to three-fourths of a mile east of the location of that fusee (T 85). In addition, Defendant NATION placed a double red reflector on the highway, in the west bound lane of traffic, at a point also 300 feet in either direction from the stopped vehicles (T 92). The statute permits the use of these portable reflectors in lieu of electric lanterns and lighted flares. The wrecker's red boom light and white boom light were shining on the back end of the semi trailer (T 134-135) and provided the largest possible lighted warning signal that could be given. Additionally, the read end and running lights of the semi trailer were burning (T 96, 84-85, and Plaintiff's Exhibit 22 in Evidence, at pages 29-30).

This combination of warnings far exceeded the requirements of the statute and under the circumstances then present gave warning to approaching motorists at a distance many times that at which that the statute attempted to assure such notice would be given.

Defendant NATION gave one additional warning, he utilized the only other means at his disposal to warn the operator of the approaching Buick, by flicking his lights back and forth from parking beam to driving beam (T 102).

In the case of *Bowmaster* vs. *William H. DePree Co.* the defendant was blocking the highway in an attempt to pull a disabled automobile from the ditch. The time was 10 o'clock at night. The defendant's vehicle stood upon the wrong side of the highway directly facing approaching traffic in that lane, and he turned the bright lights from the front of his truck on full to warn approaching vehicles. The Court there held that such a warning was adequate.

In the case of *Kastler* vs. *Tures,* (supra) a tow truck blocked the south bound lane of traffic of the highway in pulling a car from the ditch on that side. The car had its front and rear lights burning; the service truck had its front lights burning, also a dash light in the truck, a red tail light, and a spot light on the truck's derrick situated at the rear of the truck shining on the car in the ditch. Fifty feet north of these vehicles, stood a man with a flashlight to warn approaching south bound traffic. It was raining at the time. There the Wisconsin Supreme Court did not condemn these warnings as inadequate, even though no flares were placed along the highway.

In the case of *Henry* vs. *S. Liebovitz* & *Sons* (supra) a west bound tow truck was moving diagonally across the east-west highway in towing a disabled automobile from the north side of the highway on to the highway. The truck occupied almost all of the highway. This occurred between 10 and 11 o'clock on a dark, cloudy night. The only lights lighted were the truck's two headlights and two green lights on the top of the truck. When an east bound car approached, the truck driver "rushed forward and attempted to warn the approaching car by waving a flashlight and by passing his hand across the headlight of the truck. The warnings were ineffective." Even these meager warnings were not questioned by the Court.

If the warnings set forth in the cases of *Bowmaster* vs. *William H. DePree Co.* (supra), *Kastler vs. Tures* (supra), and *Henry* vs. *S. Liebovitz* & *Sons* (supra), could be construed to be adequate warnings and such as the ordinarily prudent man

would give under the same or similar circumstances, then there can be no question but that the extensive warnings given by Defendant NATION would not only satisfy the Arizona statute, but would clearly and as a matter of law fulfill the common law duty imposed upon NATION to adequately warn travelers on the highway of the presence of the vehicles.

The question of the adequacy of the warnings is further demonstrated by the testimony that several west bound cars slowed and safely passed the tow truck and semi while they were in the identical position, just prior to the approach of the Buick (T 137).

There can be no negligence ascribed to Defendant NATION'S failure to move the tow truck from the highway after he made his determination that the Buick was traveling at a high rate of speed (T 136). The only evidence in the record is that it was a physical impossibility for NATION to get out of the cab, go to the rear of the tow truck, perform the operations necessary to take the winch motor out of gear, return to the cab and move the tow truck before the Buick arrived at the location of the tow truck (T 141). NATION estimated this time interval as 15 to 20 seconds (T 105). At a speed of 100 miles per hour, or 146.6 feet per second, the Buick would travel 2932 feet, over half a mile, in 20 seconds' time.

In the case of Robinson vs. Lehnert, 71 Ariz, 454, 229 P. (2d) 708, 709, the Arizona Supreme Court defined wilful and wanton negligence, saying:

> "Wanton and wilful negligence is defined in Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 166 P. 2d 816, 819, wherein we cited Restatement of the Law, Torts, Vol. II, Sec. 500, p. 106: 'The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.' "

It is clear that NATION'S conduct does not fall within this definition.

There is no question of fact involved in this appeal. The evidence is undisputed. There is no evidence of any act of negligence by Defendant NATION, Plaintiff having entirely failed in his burden of proof in this regard. It is axiomatic that if Defendant NATION was not negligent, his employer GRIFFEN BUICK, INC., could not be liable in any respect whatsoever.

II.

This Argument is urged in support of Specifications of Error Nos. I, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI and XVII.

The transcript of record does not reveal any direct evidence as to who was driving the Buick automobile. The only such evidence appears in Plaintiff's Exhibit 20 in Evidence at pages 3-6, where Patrolman Cochran refers to GENERAL GRANT GREER, JR., as the driver without stating the basis for his assumption.

The driver of the Buick, whoever it may have been, had clearly defined statutory duties under Section 66-157a Arizona Code Annotated 1939, as amended by Laws 1950 (1st S.S.) Ch. 3, Sec. 56 (see Appendix page 36 for full text).

The driver of the Buick violated the statute in at least three different respects.

Paragraph (a) was violated. The Buick, according to the only evidence, traveled at a speed of over 70 miles per hour (T 139) and at a speed of 100 miles per hour (T 102). It was nighttime, there was a slight curve in the road (T 67-68), a 2% upgrade (T 70), and a knoll that temporarily obstructed the driver's view (T 84). There was a fusee visible for three-fourths of a mile before the Buick reached it (T 85). there was a clear view of the tow truck and semi for 300 feet before the Buick reached those vehicles (T 83-85). The operation of the

Buick at such high speeds was not reasonable and prudent with regard to "actual and potential hazards then existing." It is obvious that the speed of the Buick was not so controlled as was necessary for it to avoid colliding with the tow truck and semi which were making proper use of the highway.

Paragraph (b) was violated. The Buick exceeded the 50 mile per hour speed limitation for travel on State highways during nighttime. It traveled 275 miles from Benson, Arizona, through Tucson, Picacho, Eloy, Casa Grands and Gila Bend, Arizona, to the scene of the accident in 5¾ hours (T 125, 127-131, Plaintiff's Exhibit 20 in Evidence, page 22, beginning at 4:30 p.m. This occurred in December and at least 4¾ hrs. thereof would necessarily be nighttime travel. About 2 miles before reaching the scene of the accident, the Buick was traveling well over 70 miles per hour (T 139) and immediately prior to the collision it was traveling at approximately 100 miles per hour (T 102). Under the statute, this is prima facie evidence that the Buick's speed was not reasonable or prudent and was unlawful. The burden then shifted to the Plaintiff to prove that such speed was reasonable, prudent and lawful. No evidence tending to even raise such an inference was introduced.

Paragraph (c) was violated. The driver was approaching and upon a curve (T 67-68), approaching a hill crest (T 70), and traveling on a winding road (T 85). This occurred at nighttime (Plaintiff's Exhibit 20 in Evidence, page 22). The driver did not reduce the Buick's speed (T 101-102).

Under the positive direction of the statute, the evidence shows that prima facie the speed and operation of the Buick was unreasonable, imprudent, unlawful and therefore negligent. No evidence was introduced to rebut this negligence.

It is the general rule that where there are no flares placed along the highway to warn approaching vehicles that the highway is blocked or partially blocked by other vehicles, it is a question of fact whether or not the driver of the approaching vehicle is negligent in failing to see such stopped vehicles in sufficient time to avoid colliding with them.

McNAIR vs. *BERGER*,
94 Mont. 441; 15 P. (2d) 834.

KASTLER vs. *TURES*,
199 Wisc. 120, 210; NW 415, 417.

SMITH vs. LITTON,
47 Sou. (2d) 441.

The question is determined by the test of whether a reasonably prudent man would have seen such obstructions in time to avoid colliding with them under the same or similar circumstances.

In *McNair* vs. *Berger* (supra), the only lights present in that instance were on the wrecker and there were no other warnings.

In *Kastler* vs. *Tures* (supra), the headlights of the tow truck were focused on the automobile it was attempting to pull out of the ditch. No warning flares were placed on the highway. A man stood a short distance down the road from the tow car and attempted to warn the plaintiff's approaching automobile. There plaintiff claimed that he was attempting to drive to the right of the truck headlights when the accident occurred. The Court in that instance found that the tow truck operator was negligent in failing to place flares to warn approaching traffic and also held that the driver of plaintiff's automobile was negligent in approaching at a high rate of speed, in not stopping before colliding with the disabled vehicle which "was visible under the Litton (tow truck) headlights, and in failing to observe (or disregarding) the warning of the man who was on the road endeavoring to warn plaintiff's driver of the imminent danger.

The Arizona Supreme Court in cases where the obstruction on the highway was unlighted, has also held it to be a question of fact as to whether the approaching driver was negligent in failing to see the object on the highway.

In the case of *Krauth* vs. *Billar*, 71 Ariz. 298; 226 P. (2d) 1012, an unlighted car, out of gas, was being pushed southward by five teenagers at night. The Billar automobile was traveling south on the same highway and the driver was allegedly blinded by the lights of an approaching north bound automobile. The Court there said:

> "We believe the just test to be: What would an ordinarily prudent person have done under the circumstances as they then appeared to exist."

The Court further said:

> "Here the Appellee BILLAR, claims to have been blinded by the headlights from the 'jeep' which was stopped beside the Ford car. Under such circumstances it became his duty to stop. In the Alabam Freight Lines case, supra, we quoted with approval, the following, from Coe vs. Hough, 42 Ariz, 293; 25 P. (2d) 547, 550: '———If an autoist cannot see where he is going, he should stop. If his vision is limited, he should have such control of his car as to be able to stop within the range of his vision. If he violates these reasonable and sane rules and runs into someone who is at the time exercising reasonable care, he is, we think, guilty of legal negligence.
>
> In analyzing the cases used in determining the proper test, the Court there also quoted at length from the Supreme Court of Washington, in the case of *Morehouse* vs. *City of Everett*, 141 Wash. 399; 255 P. 157, 160; 58 ALR 1482, from which we quote '———we believe, generally speaking, where the statutes or the decisions of the Court require red lights as a warning of danger on any object in the highway and such lights are not present, it is a question for the jury to determine whether the driver at night should have seen the obstruction, notwithstanding the absence of red lights.' "

Again in *Butane Corporation* vs. *Kirby* 66 Ariz. 272; 187 P. (2d) 325, 334, the facts were generally similar to those in the *Krauth* vs. *Billar* (supra) case. The Arizona Court there stated:

"The driver of an automobile at night is guilty of negligence if he collides with an object which he has failed to see, and which an ordinarily prudent driver under like circumtsances would have seen. He was guilty of negligence———in the event that a reasonably prudent person would have observed the truck and trailer regardless of the fact that it was without lights."

When the driver of an approaching car has a clear and unobstructed view of the potential hazard, the Arizona Supreme Court has stated a different rule. In *Motors Insurance Corporation* vs. *Rhoton*, 72 Ariz. 416; 236 P. (2d) 739, the approaching driver was traveling in second gear, driving upon slippery roads as he came to the top of the slight hill which was 100 feet from cars parked so that they partially extended on the right side of the highway. The testimony was that the approaching Rhoton car was traveling 20 to 25 miles per hour. The Court criticized counter-claimant Rhoton, saying:

"The physical facts demonstrate that Mr. Rhoton must have been driving his car at a high rate of speed and without due regard to the traffic, surface and width of the highway and other conditions then existing. After he saw the Webb car or could have seen it, he traveled a distance of approximately 400 feet. After passing the crest of the hill and before crashing into the Webb car, he traveled a distance of approximately 100 feet. In crashing into the rear of the Webb car with such terrific force that he bashed in its rear, caused the front of it to be bashed in when colliding with the Clark car, caused the Clark car to be bashed in and then skidded a distance of 147 feet across the highway through and arroyo and up against 10 foot embankment where it came to rest, conclusively demonstrates that the accident was due to the sole, gross and wanton negligence of counter claimants as defined in Alabam Freight Lines vs. Phoenix Bakery, 64 Ariz. 101, 106; 166 P. (2d) 816; Butane Corporation vs. Kirby, 66 Ariz. 272; 187 P. (2d) 325."

Even unlighted obstructions upon the highway do not relieve a driver from watching the road ahead. In the case of *Spang* vs. *Cote*, 68 Atl. (2d) 823, where the approaching driver

collided with an unlighted load of hay, the Court said that the driver was bound to use his eyes and to seasonably see that which is open and apparent.

The case before this Court does not involve unlighted objects on the road, nor even a situation where there are meager lights on the tow truck and semi. It involves a situation where the warnings given were in excess of the statutory requirements and every conceivable and possible warning was used and in operation.

Although the Arizona Supreme Court has not specifically ruled upon the point, the only logical inference from that part of the decision in the case of *Krauth* vs. *Billar,* which we have quoted above, is that when red lights as warnings of danger are required and they are present, that under such a situation the failure of an approaching driver to heed the warnings and see the well lighted obstructions would, as a matter of law, constitute legal negligence on the part of that approaching driver.

The Buick driver had a clear view of the red fusee while traveling for a distance of ¾ of a mile to the fusee's position. The lights of the tow truck and semi were visible to that driver from a distance of ¾ of a mile (T 83-85). They would necessarily appear to be to the west of the red fusee. From a point alongside of the fusee, the Buick driver had a clear view of the stopped equipment for 300 feet (T 83-85). This equipment was brilliantly lighted by all of the semi's lights, the tow truck's parking lights, and the back end of the semi trailer was lighted by the red and white boom lights (T 96-97 and T 100), the lights on the wrecker were blinking from parking beam to driving beam (T 101). All of these warnings were out of the ordinary. A red fusee alongside the road means but one thing, potential danger ahead. A red reflector in the middle of a traffic lane means danger ahead in that lane. Blinking headlights are indicative that an abnormal situation exists and a maze of lights, red and white, centered at one

place along the highway also indicates the presence of an abnormal traffic condition.

All of these warnings were visible to the Buick driver (T 83-85). All of these warnings would be visible to and be seen by any west bound driver that was watching the road ahead. All of these warnings were seen and heeded by those west bound cars immediately ahead of the Buick which slowed and safely passed to the south of the tow truck and semi (T 137).

Despite these multiple warnings, the time of night and the character of the road, the Buick driver did not reduce his speed but continued to operate the Buick at an extreme speed up to the point where it ran into the tow truck and trailer and caused tremendous damage. There is no evidence of excuse or reason for the conduct of the driver of the Buick. This conduct was wilful and wanton in that the driver knew, or had reason to know, that travel at such speed and in such a manner under the circumstances present involved at very least a high degree of probability that substantial harm would result.

In the case of *Peterson* vs. *Denevan*, 177 Fed. (2d) 411, 412 (CCA 8th) the Court said:

> "The question of negligence of whatever degree or description is ordinarily one of fact to be determined by the jury in all cases tried to a jury, and by the Court in cases tried to the Court without a jury. It becomes a question of law only when the facts are undisputed, or if in dispute, are of such potency that all reasonable men must reach the same conclusion."

Defendants submit that in the case before the Court the question of negligence of the driver of the Buick is a question of law. The facts are undisputed. They are of such potency that all reasonable men must reach the same conclusion and that conclusion is that the sole and proximate cause of the collision, injuries and deaths was the wilful and wanton negligence of the driver of the Buick.

III.

This Argument is urged in support of Specification Nos. I, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI and XVII.

Defendants do not abandon their Arguments I and II by advancing this Argument. This Argument is presented upon the alternative theory that assuming GENERAL GRANT GREER, JR. was driving the Buick automobile, he was, as a matter of law, guilty of contributory negligence.

This case was tried before the Court without a Jury. The evidence was undisputed except for the date upon which the GREERS left California (T 120-121) and here the evidence is so strong that the only conclusion to which it can lead is that they left California enroute to Detroit not more than a week prior to the date of the accident. The testimony of Plaintiff LONDON EVANS at the inquest (Plaintiff's Exhibit 20 in Evidence, page 13, lines 12 through 19) and his conversation with the Patrolman after the inquest (T 121 and 124) would unquestionably be Plaintiff LONDON EVANS' best recollection. With this undisputed state of the evidence, the District Court's Findings of Fact, Conclusions of Law and Judgments, would have to result from inferences and conclusions. The Circuit Court has the same undisputed evidence before it in the transcript of record. The District Court was in no better position than the Circuit Court of Appeals now is to view this evidence. There is no question involved of usurping the power of the jury on the question of contributory negligence.

In the matter of *Motors Insurance Corp.* vs. *Rhoton,* 72 Ariz; 236 P. (2d) 739, the Appellant, Plaintiff below, was driving eastward on a main highway in Arizona. The road was covered in places with patches of snow and ice. The plaintiff stopped her car just off the paved surface of the highway, being afraid to continue on the road ahead. 100 feet behind her car there was a rise in the road and the road between the rise and the car was icy. After she stopped, a Mr. Webb's car came over

the rise, began to skid, and was finally brought under control and to a stop just behind her car and the right rear fender of her car was slightly dented by the left front fender of the Webb car. The Webb car was approximately 2½ feet onto the highway.

The drivers were outside their automobiles talking when the Appellee, who was counter-claimant in the lower Court, drove his car over the rise, striking the rear end of the Webb car. In the words of the Court:

> "The force of the collision drove the front end of the Webb car into the rear end of the Clark car smashing and denting in the fender, trunk and bumper. Neither of the parties (Webb and Clark) knew what hit them but they found themselves on the ground and knocked several feet farther away from their cars. One of Mrs. Clark's shoes was thrown a distance of 50 feet. The Rhoton car (counter-claimants) skidded across the highway in a northeasterly direction, traveled 147 feet over a pile of limbs and debris and through an arroyo and up against a steep embankment, the top of which was some 8 or 10 feet above the bottom of the arroyo. When the Rhoton car came to rest, its front end was upon the bank with its rear end in the arroyo. The damage to the Rhoton car was so extensive it cost $425.37 to have it repaired. The damage to the Webb car was in the sum of $507.81."

The Court then continued to describe the evidence, saying:

> "That the Webb and Clark cars at the time they were parked could have been seen from a distance of more than 400 feet by Mr. Rhoton as he approached; that the highway in this particular area was straight; that at the time that Mr. Rhoton was approximately 400 feet away from the Webb and Clark cars he was traveling slightly uphill; that the crest of the rise was approximately 300 feet in front of him; and that after crossing over the crest he had approximately 100 feet to travel before reaching the Webb car. It was on this down portion, the last 100 feet, that he encountered ice and snow. Rhoton testified that before and after he crossed over the rise in the highway he was traveling in second gear "just moseying up the hill; just poking

in second gear". Both Mr. and Mrs. Rhoton testified that they did not see the Webb and Clark cars before reaching the crest of the rise and that as they approached the crest it was not possible to see anything ahead except the road. This statement is refuted by the photographs in evidence."

The Arizona Court held that the mere fact that the Webb car might have protruded on to the highway a distance of 3 or 4 feet, did not in and of itself constitute an act of actionable negligence. The Court also held that in its view of the evidence, the protrusion of the Webb car on to the highway could in no manner have been an efficient or contributing cause to the accident.

"The physical facts demonstrate that Mr. Rhoton must have been driving his car at a high rate of speed and without due regard to the traffic, surface and width of the highway and other conditions then existing. After he saw the Webb car or could have seen it, he traveled a distance of approximately 400 feet. After passing the crest of the hill and before crashing into the Webb car, he traveled a distance of approximately 100 feet. In crashing into the rear of the Webb car with such terrific force that he bashed in its rear, caused the front of it to be bashed in when colliding with the Clark car, caused the Clark car to be bashed in, and then skidded a distance of 147 feet across the highway through an arroyo and up against 10-foot embankment where it came to rest, conclusively demonstrates that the accident was due to the sole, gross and wanton negligence of counterclaimants, as defined in Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 106; 166 P. 3d 816; Butane Corporation vs. Kirby, 66 Ariz. 272, 187 P. 2d, 325."

In the case of *Spang* vs. *Cote,* 144 Me. 338, 68 Atl. (2d) 823, a car struck an unlighted load of hay stopped on the highway directly ahead. The car knocked the hay trailer and tractor weighing 5 or 6 tons, more than 10 feet, and also demolished the plaintiff's automobile. The Maine Court found the facts clearly showed that plaintiff's testimony to the effect he was driving 25 to 30 miles per hour, was erroneous, and held that

the plaintiff was bound to use his eyes and bound to seasonably see that which was open and apparent.

In the case of *Dietz* vs. *Morris*, 98 Atl (2d) 537, the Maine Court had before it a situation where a truck was left upon the highway without lights. It was a clear night and an approaching car rounded a curve at 40 to 45 miles per hour. The truck was at that point 270 feet ahead of the car on a straight-of-way. The driver of the approaching car did not see the parked truck until 30 to 40 feet distant. He then jammed on his brakes and swerved, but was too late to avoid a collision. In speaking of the driver of the approaching car, the Court said:

> "There is no doubt that he either did not see what was plainly visible right in front of him, or that he rushed into a place where his vision was obscured so that he could not stop within the distance that was illumined by his own headlights." and "In either case, he was contributorily negligent as a matter of law and his recovery is barred."

The Court went on to hold that a verdict for the defendant truck driver was properly directed.

The facts in the case before this Court are even stronger. Defendant J. W. NATION was making a proper use of the highway in his operation of the tow truck. Although not controlled by statute, his use of the highway was in compliance with any requirement that could possibly be pertinent. He had complied with the common law duty to exercise due care and warn others on the highway of the presence of the tow truck and the semi. The driver of the Buick had ignored the fusees that had been placed in such locations as to give approaching motorists the greatest advance warnings (T 66, 81-82, 85, 90-91). The driver of the Buick had also ignored the warning of the red reflectors which were located on the highway near the fusees (T 92, 137). The driver of the Buick either failed to see or ignored the stopped equipment which was brilliantly lighted (T 84-85, 96,-97, 100-101, 134-135). The driver of the Buick ignored the warning given by Defendant J. W.

NATION blinking his headlights from parking to driving beam (T 102). The driver of the Buick continued his excessive speed, giving no heed to these multiple warnings of danger (T 63, 101-102). That speed and the failure to heed the warnings, were the proximate cause of the collision.

Upon these facts we submit that reasonable men could not differ in their conclusion, and that such conclusion must necessarily be that, regardless of the question of whether or not Defendant J. W. NATION was negligent, the driver of the Buick automobile was, as a matter of law, negligent, and that such negligence was gross and wanton negligence.

IV.

This Argument is urged in support of Specifications of Error Nos. I, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI and XVII.

This Argument is necessarily based on the assumption that GENERAL GRANT GREER, JR., was driving the Buick and that he was negligent.

The question of whether the negligence of one spouse should be imputed to the other due to the fact that recovery would be an asset of the community is not here involved, nor is the question of the husband having control of the automobile which is community property, here involved.

GENERAL GRANT GREER, JR., and RUBBY GREER, were traveling in a Buick car owned by the United Church of God in Christ. The record does not disclose whether one or both arranged to, and borrowed the car. It does not disclose the purpose of their venture, or whether both shared the driving responsibilities. The Restatement of the Law on Torts, Negligence, Section 491, page 1273, sets forth the rule on joint enterprise:

"Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the

contributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to third persons injured by the negligence of a fellow member."

"Comment f. The fact that the driver and another riding with him are in joint possession of the vehicle is sufficient to make any journey taken by them therein a joint enterprise irrespective of whether the journey is or is not made for a common business purpose. This is so not only when the joint possession arises from a joint hiring, but also when it results from a joint ownership."

Applying this rule to the facts present, the undertaking was a joint enterprise and each of the GREERS had equal interests and rights in the conduct of the trip and in the control of the automobile.

It is the general rule that the negligence of the driver is imputable to a passenger where both are engaged in a joint enterprise.

ROCCA vs. *TILLIA* (Pa.)
162 Atl. 495.

GREENWELL'S ADMINISTRATOR vs. *BURBA*
298 Ky. 255; 182 SW (2d) 436.

In the case of *Greenwell's Administrator* vs. *Burba*, several boys agreed that one of their number would borrow a car and all would share in the expenses of the trip to a nearby town to a dance. On their return they were traveling down a hill at an excessive speed when they came upon a truck parked partially upon the boys' side of the highway. To avoid the truck, the boys went off the road and drove between the truck and a rock pile. They first left the road when 150 feet away, and then traveled 300 feet upon the shoulder, upsetting the car and causing the boys' deaths. This constituted a joint enterprise with a joint right and privilege of directing the movement and management of the car, and upon that theory the Court imputed the negligence of the driver to the passengers.

Since the GREERS were engaged in a joint venture, the negligence of GENERAL GRANT GREER, JR., would be imputed to RUBBY GREER.

Even as an ordinary passenger in the Buick automobile, there were certain duties incumbent upon RUBBY GREER. In *Benton* vs. *Thompson* (Mo.) 156 SW (2d) 739, the Court found that a passenger plaintiff must exercise ordinary care for her own safety. They approved an instruction to the effect that if the jury found that the deceased passenger "in the exercise of ordinary care for her own safety could have observed and seen the approach of the train in time thereafter to have warned the driver of the automobile of the approach of said train, and in time for the driver to have so handled the automobile as to have prevented the collision", the plaintiff would not be entitled to recover.

In *Friedman* vs. *Friedman,* 40 Ariz. 96; 9 P. (2d) 1015, plaintiff rode from Yuma, Arizona, to Calexico in defendant's automobile. Three times during the trip defendant drove at excessive speeds and on protests, slowed down. On the return trip, the driver had promised to drive more slowly but shortly after leaving, operated the car at high speed despite protests. The car burst into flame, went out of control and turned over, injuring plaintiff. The Court there held that it was the duty of plaintiff to leave the car before the accident occurred, or to place some other driver in charge, and that they were at fault in being in the car at the time it overturned.

In *Franco* vs. *Vakares,* 35 Ariz. 309; 277 P. 812, plaintiff accepted a ride with defendant and spent several hours drinking and joy riding around Tucson, Arizona. The inevitable accident occurred. The Court there linked the situation to a joint venture, saying that the common will of joint venturers usually controlled and directed their movements, and that the plaintiff knew or should have known that the defendant was unfit to drive the car and that his driving would endanger the lives of

others, but despite this fact plaintiff voluntarily rode with defendant.

RUBBY GREER was a passenger in the Buick automobile. She would have a duty not only to require that the car be driven at a slower speed, but also to warn the driver of the car of the apparent danger ahead. The speed of between 70 and 100 miles per hour at night in the area of the accident was so excessive as to require any person riding as a passenger in a car at such speed, to take steps necessary to have the driver reduce its speed or for such passenger to leave the car in the interests of that passenger's own safety.

The red fusee was visible to RUBBY GREER as a passenger in the car when that car was ¾ of a mile distant from the fusee (T 85). At the same point, the many lights on the tow truck and semi were also visible to her (T 83-85). These fusees and lights could mean only danger. At that point, RUBBY GREER, in the exercise of ordinary care for her own safety, could have observed and seen the warnings in sufficient time to have warned the driver of the Buick automobile, and in time so that the driver could have handled the automobile in such a manner as to have prevented the collision. It is apparent that she did not do so, and the Estate of RUBBY GREER is not entitled to recover from defendants or either of them.

CONCLUSION

Defendants sincerely submit that all, and the only, evidence introduced establishes (1) no negligence on the part of Defendant J. W. NATION and consequently no negligence on the part of Defendant GRIFFEN BUICK, INC., and (2) sole, and wilful and wanton negligence upon the part of the driver of the Buick in which the GREERS were riding. Under the circumstances present GENERAL GRANT GREER, JR. was, as a matter of law, guilty of at least contributory negligence, and that negligence was so gross, wilful and wanton as to require its imputation to RUBBY GREER.

Defendants respectfully submit that under every possible view of the evidence and law, the Findings of Fact and Conclusions of Law and Judgements were erroneous.

Defendants respectfully ask that Judgment in each of these causes be reversed and that each of these causes be remanded with directions to enter Judgments for the Defendants and each of them in each cause.

Respectfully submitted,

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APPENDIX

66-157a. Special restrictions.—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

(b) Where no special hazard exists that requires lower speed for compliance with paragraph (a) of this section the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Fifteen (15) miles per hour approaching school crossing;
2. Twenty-five (25) miles per hour in any business or residence district;
3. (a) Fifty (50) miles per hour in other locations during daytime except state highways;

   (b) Reasonable and prudent miles per hour during the daytime on state highways;
4. (a) Forty-five (45) miles per hour during the nighttime in other locations except state highways;

   (b) Fifty (50) miles per hour during the nighttime on state highways.

Daytime means from a half hour before sunrise to a half hour after sunset. Nighttime means at any other hour.

The prima facie speed limits set forth in this section may be altered as authorized in Sections 57 and 58 (Sections 66-158, 66-159).

(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions. (Laws 1950 (1st S.S.) ch. 3, Sec. 56).

66-171. Stopping, standing, or parking outside of business or residence district.

(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of 200 feet in each direction upon such highway.

(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position. (Laws 1950 (1st S.S.) ch. 3, Sec. 107).

66-182a. Display of warning devices when vehicle disabled.

(a) Whenever any motor truck, passenger bus, truck, tractor, trailer, semi-trailer, or pole trailer is disabled upon the

traveled portion of any highway or the shoulder thereof outside of any municipality at any time when lighted lamps are required on vehicles the driver of such vehicle shall display the following warning devices upon the highway during the time the vehicle is so disabled on the highway except as provided in paragraph (b);

1. A lighted fusee shall be immediately placed on the roadway at the traffic side of the motor vehicle unless electric lanterns are displayed.

2. Within the burning period of the fusee and as promptly as possible three (3) ligthed flares (pot torches) or three (3) electric lanterns shall be placed on the roadway as follows:

   One (1) at a distance of approximately 100 feet in advance of the vehicle, one (1) at a distance of approximately 100 feet to the rear of the vehicle, each in the center of the lane of traffic occupied by the disabled vehicle, and one (1) at the traffic side of the vehicle approximately 10 feet rearward or forward thereof.

(b) Whenever any vehicle used in the transportation of flammable liquids in bulk, or transporting compressed flammable gases is disabled upon a highway at any time or place mentioned in paragraph (a) of this section, the driver of such vehicle shall display upon the roadway the following lighted warning devices: One (1) red electric lantern shall be immediately placed on the roadway at the traffic side of the vehicle and two (2) other red electric lanterns shall be placed to the front and rear of the vehicle in the same manner prescribed in paragraph (a) above for flares.

When a vehicle of a type specified in paragraph (b) is disabled the use of flares, fusees, or any signal produced by flame as warning signals is prohibited.

(c) Whenever any vehicle of a type referred to in this section is disabled upon the traveled portion of a highway or the shoulder thereof outside of any municipality at any time when the display of fusees, flares, or electric lanterns is not required, the driver of such vehicle shall display two (2) red flags upon the roadway in the lane of traffic occupied by the disabled vehicle, one (1) at a distance of approximately 100 feet in advance of the vehicle, and one (1) at a distance of approximately 100 feet to the rear of the vehicle.

(d) In the alternative it shall be deemed a compliance with this section in the event three (3) portable reflector units on standards of a type approved by the department are displayed at the times and under the conditions specified in this section either during the daytime or at nighttime and such portable reflector units shall be placed on the roadway in the locations as described with reference to the placing of electric lanterns and lighted flares.

(e) The flares, fusees, lanterns, and flags to be displayed as required in this section shall conform with the requirements of section 151 (Sec. 66-181) applicable thereto. (Laws 1950 (1st S.S.) ch. 3, Sec. 152.)

No. 14,749

IN THE

United States Court of Appeals

For the Ninth Circuit

GRIFFEN BUICK, INC., a corporation, and J. W. NATION,

Appellants,

vs.

LONDON EVANS, Administrator of the Estate of General Grant Greer, Jr., Deceased,

Appellee.

GRIFFEN BUICK, INC., a corporation, and J. W. NATION,

Appellants,

vs.

LONDON EVANS, Administrator of the Estate of Rubby Greer, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Preliminary statement	1
Jurisdiction	2
Statement of the case	2
Summary of argument	11
Argument	13
I. The judgments must be affirmed if they are supported by substantial evidence	13
II. There is substantial evidence that negligence of defendant Nation was the proximate cause of the accident	15
A. There is ample evidence that Nation negligently violated several applicable statutes	15
B. There is ample evidence which supports the finding that defendant Nation was negligent irrespective of statutory violations	22
III. Contributory negligence was at least a question of fact	28
A. Appellants failed to sustain their burden of pleading and proving contributory negligence	28
B. In any event, the evidence does not show that the driver of the Buick was guilty of contributory negligence as a matter of law	31
C. The evidence would support a finding that the last clear chance doctrine was applicable	35
D. The evidence would support a finding that Nation's conduct was wilful and wanton	38
Conclusion	40

Table of Authorities Cited

Cases

Alabam Freight Lines v. Phoenix Bakery (1946), 64 Ariz. 101, 166 P. 2d 816 39
Andruss v. Nieto (1940, 9th Cir.), 112 F. 2d 250 ..... 14, 33

Baltimore & P. R. Co. v. Landrigan (1903), 191 U.S. 461, 48 L.Ed. 262, 24 S.Ct. 137 35
Bowmaster v. William H. De Pree Co. (1932), 258 Mich. 538, 242 N.W. 755 26
Bragg v. Smith (1948), 87 Cal. App. 2d 11, 195 P. 2d 546 36
Butane Corporation v. Kirby (1947), 66 Ariz. 272, 187 P. 2d 325 ..... 13, 34

Casey v. Marshall (1946), 64 Ariz. 232, 168 P. 2d 240, 64 Ariz. 260, 169 P. 2d 84 35
Chandler v. Dugan, 70 Wyo. 439, 251 P. 2d 580 30
City of Phoenix v. Mullen (1946), 65 Ariz. 83, 174 P. 2d 422 15
City of San Diego v. Perry (1941, 9th Cir.), 124 F. 2d 629 14

Erie R. Co. v. Tompkins (1937), 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 13

Girdner v. Union Oil Co. (1932), 216 Cal. 197, 13 P. 2d 915 35
Goodman v. Keeshin Motor Express Co. (1934), 278 Ill. App. 227 ..... 23, 31

Hatch v. Daniels, 96 Vt. 89, 117 A. 105 34
Henry v. S. Liebovitz & Sons (1933), 312 Pa. 397, 167 A. 304 26
Herron v. Southern Pacific Co. (1930), 283 U.S. 91, 75 L. Ed. 859, 51 S.Ct. 383 13
Herzberg v. White (1937), 49 Ariz. 313, 66 P. 2d 253 16

Kastler v. Tures (1926), 199 Wisc. 120, 210 N.W. 415 ..18, 25, 26
Kocher v. Creston Transfer Co. (1948, 3rd Cir.), 166 F. 2d 680 30

Marchese v. Methany, 23 Ariz. 333, 203 P. 567 34
McCaughn v. Real Estate Land Title & Trust Co. (1935), 297 U.S. 606, 80 L.Ed. 879, 56 S.Ct. 604 14

Pages

McIver v. Allen, 33 Ariz. 28, 262 P. 5 34
McNair v. Berger (1932), 94 Mont. 441, 15 P. 2d 834 27
Melville v. State of Maryland (1946, 4th Cir.), 155 F. 2d 440 30

National Labor Relations Board v. Dinion Coil Co. (1952, 2nd Cir.), 201 F. 2d 484 14

Osterode v. Almquist (1948), 89 Cal. App. 2d 15, 200 P. 2d 169 ..... 20, 24

Pearson & Dickerson Contractors, Inc. v. Harrington (1943), 60 Ariz. 354, 137 P. 2d 381 ..... 13, 28
Peterson v. Burkhalter (1951), 38 Cal. 2d 107, 237 P. 2d 977 36

Root v. Pacific Greyhound Lines (1948), 84 Cal. App. 2d 135, 190 P. 2d 48 35

St. Johnbury Trucking Co. v. Rollins (1950), 145 Me. 217, 74 A. 2d 465 ..... 16, 31, 39
Salt River etc. Association v. Green (1940), 56 Ariz. 22, 104 P. 2d 162 ..... 17, 29
Selinsky v. Olsen (1951), 38 Cal. 2d 102, 237 P. 2d 645 36
Smith v. Litton (1950, La. App.), 47 So. 2d 411 24
Southern Pacific Co. v. Guthrie (1951, 9th Cir.), 186 F. 2d 926 14
Southwestern Freight Lines v. Floyd (1941), 58 Ariz. 248, 119 P. 2d 120 15
State of Utah v. Busby (1942), 102 Utah 416, 131 P. 2d 510 35

Trefzer v. Stiles (1952), 56 N.M. 296, 243 P. 2d 605 30

United States v. De Back (1941, 9th Cir.), 118 F. 2d 208 .. 14

Weller v. Fish Transport Co. (1937), 123 Conn. 49, 192 A. 317 30
Winder & Son, Inc. v. Blaine (1940), 218 Ind. 68, 29 N.E. 2d 987 ..... 16, 31
Womack v. Preach, 64 Ariz. 61, 163 P. 2d 280, 165 P. 2d 657 39

Constitutions

Pages

Arizona Constitution, Article 18, Section 5 ..... 13, 31

Codes

Arizona Code, Annotated, 1939, 1952 Supplement:

Section 66-157a 33
Section 66-163 32
Section 66-163a 32
Section 66-163e 32
Section 66-171a 16, 20, 21
Section 66-171b 21
Section 66-173a 16
Section 66-174g 16
Section 66-182 18
Section 66-182a 18, 19, 20, 21

Texts

20 Am. Jur. 214 34

20 Am. Jur. 215 35

21 A.L.R.2d 7, 63 16

30 A.L.R.2d 1019, 1025, Annotation 22

30 A.L.R. 2d 1019, 1027, 1028, Annotation 22

Restatement, Torts, Section 491, comment c 30

Restatement, Torts, Section 500 39

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LONDON EVANS, Administrator of the Estate of Rubby Greer, Deceased,

Appellee.

BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT.

This is a consolidated appeal by the defendants, Griffen Buick, Inc., an Arizona corporation, and J. W. Nation, from two judgments of the United States District Court for the District of Arizona in

actions for damages for the deaths of General Grant Greer, Jr., and Rubby Greer. The decedents were killed in an automobile accident on Highway 80 in Arizona. The actions were brought by the California administrator of the two decedents. They were consolidated for trial and were tried before the District Court, Honorable Dave W. Ling presiding, without a jury. The complaints charged, and the District Court found, that the accident was caused by the wilful and wanton misconduct and negligence of defendant Nation in the operation of a tow truck owned by defendant Griffen Buick, Inc. Nation was an employee of the corporation and was acting in the course of his employment.

JURISDICTION.

The plaintiff-appellee adopts the statement of jurisdiction contained in the brief of appellants.

STATEMENT OF THE CASE.

The appellants' statement of the case is inaccurate because it sets forth the evidence in the light most favorable to them and ignores the evidence which supports the judgments.

The accident occurred on December 23, 1952 (p. 48),* on Highway 80 about seventeen miles east of Yuma, Arizona. (p. 49.) The defendant Nation re-

*All such references are to pages of the transcript.

ported that the accident occurred at about 10:15 P.M. (p. 68), but the Highway Patrol officer did not receive the call until 10:40 P. M. (p. 48.) Three vehicles were involved, a truck tractor and semi-trailer operated by one Zektzer, a GMC wrecker or tow truck driven by the defendant Nation, and a Buick sedan which the decedents, Mr. and Mrs. Greer, occupied. (pp. 49, 62.) As appellants concede (Brief of Appellants, p. 20), there was no direct evidence as to who was driving the Buick automobile. It was owned by a church. (p. 62.) At the time of the accident the defendant Nation was attempting to tow or winch the tractor and semi-trailer onto the highway in order to bring that equipment into Yuma. Nation was employed by Griffen Buick, Inc., as a tow truck driver and he was in the course of his employment at the time. (pp. 87-89.) The tow truck was owned by defendant corporation.

As will be more fully shown, at the time of the accident the Zektzer truck was parked about four feet off the north edge of the highway, facing west, while the tow truck was stopped on the highway in the westbound lane, but facing east. The Buick car, proceeding west toward Yuma, came around a curve, started to pass to the right of the tow truck, but sideswiped the tow truck as the Buick started to go off on the shoulder. The Buick then struck the rear end of the Zektzer semi-trailer.

The defendant Nation testified that Zektzer came to Griffen Buick's place of business on the evening of December 23rd and stated that his truck had

broken down on the highway about fifteen or sixteen miles east of Yuma. (p. 88.) Zektzer asked Nation to come out and tow his truck into Yuma. (p. 88.) Nation drove Zektzer out to the disabled truck; they left Yuma about 9:30 P.M. and arrived at the scene "around ten o'clock, maybe a little before, a little after". (p. 89.)

Nation testified that the Zektzer truck was about three or four feet off the road, facing west, parallel to the westbound lane on the north side of the highway. (p. 90.) According to Nation, the truck was not stuck in the sand, but could have pulled itself back onto the highway if its engine had been working. (p. 89.) Nation made a U-turn on the highway and pulled in front of the tractor and semi. (pp. 89-90.) At that time there were no warning signals of any kind at or about the disabled truck. (p. 91.) Nation claimed that he set out two fusees; one was supposed to be about 100 yards to the east of the semi-trailer on the north side of the road on the shoulder (pp. 90-91); the other one was supposed to have been set out about 100 yards to the west of the truck on the north shoulder. (p. 91.) Nation also claimed that he put out round reflectors about even with each fusee, but on the highway about eight to nine feet north of the center line. (p. 92.) He admitted that no flare pots or red lanterns were set out. (pp. 92-93.)

Nation's testimony, however, was completely discredited and the District Judge was entitled to disregard it because Nation had given an almost entirely

different statement to the Highway Patrol officer who investigated the accident. Officer Cochran testified that Nation had told him the following: He stated that he had been called to pull the semi out of the sand, that it got stuck off the road in the deep sand, that he had attempted to pull it out in a southwesterly direction, but had succeeded in putting it deeper into the sand, and then had reversed the procedure and went to the back of the semi, hooking onto the back of it, and had almost got it back out of the sand where he could drag it back up the road. (p. 65.) Nation also told the officer that he had put out burning fusees, one being about 100 yards east of the point of impact. (p. 66.) The officer determined that *there was no other type of warning* in addition to the fusees at the scene of the accident. (p. 68.) The officer also testified that Nation told him that the fusee to the east of the accident scene had been run over by the Buick or by some other car close behind it and that the original fusee had been replaced by a new one which was burning when the officer arrived at the scene. (pp. 66-67.) However, on the night of the accident and the next morning the officer made a search for a damaged or run-over fusee and he could not find one. (p. 67.) Hence, the District Judge, as the trier of fact, was entitled to find that Nation's testimony was not true and to find particularly that there had been no fusee at all placed out to the east of the point of the accident until after the accident occurred.

Moreover, the fusees which Nation claimed to have used were the type which burn out in about fifteen

to twenty minutes. (p. 91.) If, as Nation claimed, he arrived at the scene about 10:00 P. M. and the accident occurred at about 10:15 P.M., the District Judge had good reason to believe that any fusee put out originally would have been extinguished by the time the accident happened. His belief would be further supported by the fact that the accident probably happened later than 10:15 P.M., since the Highway Patrol did not receive the call until 10:40 P. M. (p. 48.)

Nation further testified that he first hooked the cable of the tow truck to the front of the truck tractor and tried to tow it, but was unsuccessful. (p. 93.) He then tried to winch the truck equipment out from the front. (p. 93.) He stated that he had his "foot on the brake in the truck all the time the motor was running" to keep the tow truck from rolling back while the winching operation was going on. (p. 93.) Nation claimed that he could not winch the truck tractor and semi out from the front because the slope was steeper there. (p. 94.) He then unhooked his cable and pulled around to the rear to a point where the rear of the tow truck was about thirty feet from the rear of the semi. (p. 95.) He hooked onto the semi-trailer and, using the winch, moved it about two feet when he saw the Buick car coming. (pp. 95-96.) At that time, according to Nation, the Zektzer equipment was about four feet off the highway facing in a westerly direction. (p. 97.) There was some thirty feet of cable between the rear of the semi and the rear of the tow truck. (p. 97.) The tow truck was

on the highway, facing east in the westbound lane, with its right front wheels about three feet from the center line of the highway. (p. 97.) The position of the tow truck on the wrong side of the highway was such that a westbound car (such as the decedents' Buick) would have to cross the white center line into the eastbound lane in order to pass around the tow truck. (p. 109.)

With his tow truck standing on the highway, headed east in the westbound lane, and almost entirely blocking the westbound lane, the defendant Nation did not even turn on his headlights until after he had seen the decedents' Buick approaching. Prior to that time he had only his parking lights on. (p. 97.) He put on his headlights for the first time after he saw the Buick. (p. 107.) At the coroner's inquest the defendant Nation testified that he first saw the Buick when it was only 150 yards away from the tow truck and that he "had time to flash my lights on and off to try to get the attention of the driver" of the Buick. (pp. 106-107; see Exhibit 20.) In stating that he flashed his lights on and off, he was referring to his headlights. (p. 107.) That was the first time he ever pulled on his headlights. (p. 107.)

At the trial of these actions, however, Nation changed his testimony completely and testified that he saw the decedents' car when it was a half mile to three quarters of a mile away. (p. 96.) No explanation ever was offered for this change of testimony.

Nation also claimed that at the time of the accident all of the lights on Zektzer's truck and semi-trailer

were on (p. 96) and that the two boom lights (one red and one white light) on the back of the tow truck were lit. (p. 100.) The boom lights, however, faced in the opposite direction—to the west—although they were on a swivel and could have been turned to face to the east in order to illuminate the tow car. (p. 101.) Nation's testimony in this respect also was contradicted by officer Cochran. He testified that he noticed the lights on the boom of the tow truck, but he did not recall seeing those lights burning. (p. 77.) The officer also testified that he did not recall the lights of the Zektzer truck being on when he was there. (p. 84.)

The defendant Nation testified that when the Buick car was a half mile away he estimated its speed at 100 miles per hour. (pp. 102, 105.) Nation was then seated behind the steering wheel of the tow truck with his motor running (p. 104), but he made no attempt to back up off the highway (p. 103), although he observed that the Buick was not slowing up and he knew that the driver of the Buick was completely unaware of the danger (p. 104), and notwithstanding the fact that he had some twenty seconds or more within which to take action. (pp. 105, 142.) As the Buick approached, its driver kept to the right of the tow truck. The accident happened on a curve (p. 108) and the tracks left by the Buick show that it came directly off the curve without swerving. (p. 72.) The tire marks of the Buick were forty-four feet long from the point where it first began to leave the pavement. (p. 79.) The Buick was about twenty feet to the east of the tow truck when it first went onto the

shoulder. (p. 81.) The left side of the Buick sideswiped the left side of the tow truck (pp. 71-72, 103) and the Buick continued on and struck the rear of the semi-trailer. (p. 63.) Mr. and Mrs. Greer died in the accident (p. 63), leaving seven children who reside in Berkeley, California. (p. 110.)

It is apparent, and the District Judge was entitled to find from the evidence, that the driver of the Buick car was misled and, in fact, literally trapped by the deceptive situation created by the defendant Nation; that the Buick driver saw the tow truck suddenly and at the last moment as the Buick came around the curve, that because of the curve and the position of the tow truck it appeared that the tow truck was proceeding east in its own lane, that the Buick driver kept to the right to pass the tow truck on the right, but realized too late, as the car started to go off on the shoulder, that the tow truck was actually blocking the westbound lane.

At the point of the accident the highway curves to the right as a vehicle proceeds west. (pp. 67-68.) Also, in approaching the point of the accident from the east going west, there is a knoll or sand hill to the right side of the road at a point just prior to reaching the accident scene. (p. 53.) The knoll is about fifteen feet high. (p. 67.) Officer Cochran testified that the knoll would have completely hidden any view of the Zektzer truck outfit on the shoulder as a person approached it from the east, going west. (pp. 83-84.) He estimated the distance during which any view of that truck would have been completely hidden as being from a

point a quarter of a mile to a point 150 yards east of the point of the accident. (p. 84.) In other words, as the Buick approached the scene of the accident, because of the knoll the driver could not have seen the Zektzer truck outfit on the shoulder of the highway at any time from a quarter mile away until the driver was within 150 yards of the truck.

The testimony of the defendant Nation as to the speed of the Buick was incredible and the District Judge was more than justified in disregarding it for a number of reasons. Nation claimed that he saw the Buick when it was a half mile to three fourths of a mile away; that he watched it for a second and determined its speed "within a matter of a second" (p. 96), although the Buick was then about a half mile away and it was nighttime. Later in the trial, when he was recalled as a witness by his own counsel, the defendant Nation testified that he based his estimate of the Buick's speed in part upon the whine of its tires. (p. 136.) He claimed that he could hear the sound of the tires when the Buick was a half mile away, although he was sitting in the cab of the tow truck with the motor and the winch running. (p. 140.) His testimony at the trial was completely contrary to his testimony at the coroner's inquest to the effect that he first saw the Buick when it was only 150 yards away. (pp. 106-107; see Exhibit 20.) Nation's testimony was also contrary to defendants' own evidence to the effect that the Buick traveled the last 274 miles leading up to the accident at an average speed of only about forty-seven miles per hour. (p.

145.) An undisclosed portion of this distance was traveled during the daytime, during which there is no *prima facie* speed limit in Arizona.

The only other evidence offered as to the speed of the Buick was an alleged statement by an unknown and unidentified "colored sailor" to the effect that the Buick had passed him down the road while he was doing seventy miles per hour. Of course, this was incompetent hearsay of the worst kind. While the record is not entirely clear, we understand that the District Court so ruled. (pp. 138-139.)

It is significant that the exaggerated claims of high speed on the part of the other car, as is not uncommon, are made with the knowledge that the occupants of that car are dead and cannot refute them. Under such circumstances, the decedents were entitled to the presumption that they were using due care, as will be shown.

SUMMARY OF ARGUMENT.

The District Court found that the defendant Nation was guilty of wilful and wanton misconduct and negligence which was the sole proximate cause of the accident and deaths and that the decedents were not guilty of contributory negligence. (pp. 19-21, 23-25.) Defendants-appellants contend, in substance, that these findings were without any support in the record, or, otherwise stated, that *as a matter of law,* the defendant Nation was free from negligence and the

decedents, or one of them, was contributorily negligent.

The issues of negligence and contributory negligence in this case, as in most cases, were issues of fact which were reasonably resolved by the District Court contrary to defendants. The decision of the trial court is supported by substantial evidence and, therefore, must be sustained.

There is ample evidence that the defendant Nation was negligent in several particulars. He violated several Arizona statutes, which violations were the proximate cause of the accident, or, at least, the trier of fact was entitled so to find. Irrespective of statutory violations, the trial judge was entitled to find from the evidence that Nation's conduct was negligent in the manner and means by which, and under the circumstances in which, he attempted to conduct the towing operation.

Similarly, the District Court could reasonably find, under the evidence as a whole, that the defendants had failed to sustain their burden of proving contributory negligence or sole negligence on the part of the decedent, Mr. Greer. Moreover, the evidence clearly supports the view that defendants were liable under the doctrine of last clear chance. In any event, there being evidence supporting the finding that Nation's conduct was wilful and wanton, contributory negligence was not available as a defense.

ARGUMENT.

I

THE JUDGMENTS MUST BE AFFIRMED IF THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is a universally accepted rule that negligence and contributory negligence are generally factual questions to be determined by the jury or by the trial Court when a jury is waived. If there is any substantial evidence to support the verdict of the jury or the decision of the trial Court on these questions, then the verdict or decision must be sustained on appeal.

Article 18, section 5, of the Arizona Constitution provides:

> "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

Thus, under Arizona law, the defense of contributory negligence is *always* a question of fact, while the claim of negligence is ordinarily a factual matter. (*Pearson & Dickerson Contractors, Inc. v. Harrington* (1943), 60 Ariz. 354, 137 P. 2d 381, 382; *Butane Corporation v. Kirby* (1947), 66 Ariz. 272, 187 P. 2d 325, 330.) The dubious decision in *Herron v. Southern Pacific Co.* (1930), 283 U.S. 91, 75 L.Ed. 859, 51 S.Ct. 383, holding that the Arizona constitutional provision did not apply to a federal Court sitting in Arizona, would appear to be in direct conflict with the rule in diversity cases subsequently announced in *Erie R. Co. v. Tompkins* (1937), 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, 1194, 114 A.L.R. 1487, where it was held that:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

In any event, the federal Courts have recognized the general rule that negligence and contributory negligence are normally factual matters. (*City of San Diego v. Perry* (1941), 9th Cir.), 124 F. 2d 629, 632; *United States v. De Back* (1941, 9th Cir.), 118 F. 2d 208; *Andruss v. Nieto* (1940, 9th Cir.), 112 F. 2d 250, 252.) The power and duty of determining the weight of the evidence, as distinguished from the existence of any evidence, "belongs exclusively to the trial judge." (*Southern Pacific Co. v. Guthrie* (1951, 9th Cir.), 186 F. 2d 926, 932-933.) Particularly is this true where questions of credibility are involved. (*National Labor Relations Board v. Dinion Coil Co.* (1952, 2nd Cir.), 201 F. 2d 484, 487.) Where a jury is waived, the decision of the trial Court has the same effect as the verdict of a jury, and the appellate Court cannot pass upon the weight of evidence; in such a case, the only question reviewable on appeal, with regard to the sufficiency of the evidence, is the question of whether the trial Court's decision was wholly without evidence to sustain it. (*McCaughn v. Real Estate Land Title & Trust Co.* (1935), 297 U.S. 606, 608, 80 L.Ed. 879, 881, 56 S. Ct. 604.)

It follows that the judgments in the present cases can be reviewed only to the extent of determining whether or not they are wholly without evidentiary support.

II

THERE IS SUBSTANTIAL EVIDENCE THAT NEGLIGENCE OF DEFENDANT NATION WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

A. There is ample evidence that Nation negligently violated several applicable statutes.

The pertinent Arizona rule is stated as follows in *City of Phoenix v. Mullen* (1946), 65 Ariz. 83, 174 P. 2d 422, 424:

> "We are committed to the doctrine that if the proximate cause of an injury to another is the failure of the driver to comply with the positive direction of the statute relating to the operation of a motor vehicle, such failure or violation is negligence per se and actionable negligence."

Whether or not the statutory violation was a proximate cause of the injury is generally a question of fact. (*City of Phoenix v. Mullen, supra; Southwestern Freight Lines v. Floyd* (1941), 58 Ariz. 248, 119 P. 2d 120, 125.)

The defendant Nation was stopped on the highway, headed east in the westbound lane, and almost entirely blocking the westbound lane, at about 10:00 o'clock at night, without his headlights burning; the only lights burning on the front of the tow truck were the parking lights; he did not turn on his headlights until after he saw the Buick and then he just flashed them. (pp. 97, 106-107; see Exhibit 20 at page 17 thereof.) It must be conceded that such conduct was in violation of the Arizona statutes requiring headlights to be lighted on vehicles on the highway at all times from a half hour after sunset to a half hour before sunrise.

(Arizona Code Annotated, 1939, 1952 Supplement, secs. 66-173a, 66-174g.) Such conduct has been held to be negligence per se in similar cases. (*St. Johnbury Trucking Co. v. Rollins* (1950), 145 Me. 217, 74 A. 2d 465, 466; *Winder & Son, Inc. v. Blaine* (1940), 218 Ind. 68, 29 N.E. 2d 987; *Herzberg v. White* (1937), 49 Ariz. 313, 66 P. 2d 253, 256.) As pointed out in the annotation in 21 A.L.R. 2d 7, at 63, citing many cases:

> "Parking or cowl lights have generally been held to be an ineffective substitute for the headlights required by statute . . ."

The trial Court was entitled to find that the conduct of the defendant Nation was also in violation of Section 66-171(a) of the Arizona Code Annotated, 1939, 1952 Supplement, which provides:

> "Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of 200 feet in each direction upon such highway."

Appellants seek to overcome the effect of this statute by stating, without referring to the record, as follows (Appellants' Brief, p. 16):

> "It was not only impracticable but impossible for Nation to perform his towing from any position except the position he occupied upon the highway."

This statement is without support in the evidence. Nation first attempted to tow and then to winch the Zektzer truck outfit from the front. (p. 93.) He testified that at that time the tow truck was almost entirely off the highway; the left front wheel was probably on the highway a little bit, but the other three wheels were off the highway. (Deposition of Nation, p. 22, Exhibit 22.) It was not until Nation went to the rear of the Zektzer outfit that his tow truck was stopped on the highway. He offered no explanation as to why he stopped on the highway at that time. In fact, no attempt was made to show that it was not "practicable to stop, park, or so leave such vehicle off such part of said highway." The only reason given by Nation for attempting to tow the equipment from the rear was his statement that the slope of the highway was steeper in the front. (p. 94.) If, as Nation told Officer Cochran, the truck was not disabled but was simply stuck in the sand (p. 65) and if the shoulder of the highway was of sufficient substance to support the tow truck when it was in front of the Zektzer equipment, there would appear to be no good reason why the tow truck had to block the westbound lane of the highway at the time of the accident. Under these circumstances, it was at least a question of fact as to whether or not Nation violated the statute. (See, e.g., *Salt River etc. Association v. Green* (1940), 56 Ariz. 22, 104 P. 2d 162, 164.)

Nor was there any showing that Nation "was making a proper and necessary use of the highway under an emergency" as was the case in *Kastler v. Tures* (1926), 199 Wisc. 120, 210 N.W. 415, 417, cited by appellants. In that case there had been an accident and there was a wrecked car in a ditch with the passengers in it. Moreover, the Wisconsin Court pointed out that (210 N.W. 415, at 417):

> "It is admitted that there was ample room for cars going in either direction to pass on this cement highway."

In our case it is admitted that the tow truck almost completely blocked the westbound lane. Its right front wheels were about three feet from the center line (p. 97) and a westbound car would have to cross the center line into the eastbound lane in order to pass it. (p. 109.) Furthermore, there was no emergency. The Zektzer equipment was either stuck in the sand, according to Nation's initial story, or its engine was disabled, according to the story Nation subsequently gave. In either event, there was no showing of any imperative necessity of blocking the highway in the middle of the night in order to extricate the truck.

The evidence also would support a finding that the defendant Nation violated Sections 66-182 and 66-182a of the Arizona Code Annotated, 1939, 1952 Supplement. Those sections provided, in substance, as follows: Every operator of a motor truck upon any highway outside a city at nighttime shall carry in such vehicle at least three flares or three red electric

lanterns and at least three red-burning fusees unless red electric lanterns are carried. Whenever any motor truck is disabled upon the traveled portion of any highway or the shoulder thereof outside a city at night, a lighted fusee shall be immediately placed on the roadway at the traffic side of the vehicle unless electric lanterns are displayed. Within the burning period of the fusee and as promptly as possible three lighted flares (pot torches) or three electric lanterns shall be placed on the roadway; one at a distance of approximately 100 feet in advance of the vehicle, one at a distance of approximately 100 feet to its rear, each in the center of the lane of traffic occupied by the disabled vehicle, and one at the traffic side of the vehicle approximately ten feet rearward or forward thereof. As an alternative to the use of flares or lanterns, three portable reflector units of a type approved by the Department may be used in the same manner.

Nation admitted that no flare pots or red lanterns were set out. (pp. 92-93.) He claimed, however, that he put out two round reflectors about 100 yards from each end of the Zektzer truck. (p. 92.) Even if his testimony were accepted, he failed to comply with the statute (sec. 66-182a) which requires a third reflector, flare pot or lantern to be placed at the traffic side of the vehicle about ten feet from the rear or front of it. But Nation's testimony was contradicted by Officer Cochran who determined that there was no other type of warning other than fusees at the place of the accident. (p. 68.) Nation did not mention to

Officer Cochran anything about putting out reflectors. Further, there was no showing made that the alleged reflectors were of the proper type.

Nation also claimed that he put out two fusees on the shoulder of the highway, one about 100 yards to the west of the Zektzer truck and the other about 100 yards to the east thereof. No fusee was placed to the side of the Zektzer truck. (p. 91.) Again, Nation's testimony was contradicted. He admitted that the fusee burning to the east of the accident scene when Officer Cochran arrived was not there when the accident occurred. (pp. 66-67.) He claimed that the fusee originally put out had been run over by the Buick or another car (pp. 66-67), but the officer searched the area and could not find any damaged fusee (p. 67).

Under the evidence, it is submitted that a finding of violation of Section 66-182a would be justified. In fact, the evidence supports the conclusion that there was no warning signal *of any kind* either to the east of the trucks or alongside them. (*Osterode v. Almquist* (1948), 89 Cal. App. 2d 15, 18, 200 P.2d 169.)

The argument made by appellants in this respect is ingenious, but contradictory. It is claimed, on the one hand, that Section 66-182a (dealing with flares, etc.) is inapplicable because the tow truck was not "disabled" within the meaning of the statute. (Appellants' Brief, p. 17.) On the other hand, it is argued that Section 66-171(a) (relating to stopping on the highway) is also inapplicable because the tow truck was engaged in assisting a disabled vehicle. (Appellants' Brief, pp. 14-16.) The two arguments are mu-

tually destructive. The only statutory exception to the provisions of Section 66-171(a) is that set forth in subsection (b) thereof, as follows:

> "This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

If the tow truck comes within the intent and meaning of a "vehicle which is disabled . . . in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving" it on the highway (Section 66-171(b)), then it must necessarily also come under the category of "any motor truck" which "is disabled upon the traveled portion of any highway or the shoulder thereof . . ." (Section 66-182a(a)). Otherwise stated, if the tow truck was entitled to stop on the highway pursuant to the exception embodied in subsection (b) of Section 66-171, then it should reasonably follow that the tow truck operator is subject to the requirements of Section 66-182a relative to the display of warning signals.

It may be assumed that the driver of a tow truck may not violate the intent of Section 66-171(a) in stopping on the highway under special circumstances, as where there is an emergency and no other means of making the tow are available, but no such showing was made here.

B. There is ample evidence which supports the finding that defendant Nation was negligent irrespective of statutory violations.

The general rule is stated in 30 A.L.R. 2d 1019, 1025, as follows:

> "Since towing ordinarily is the only way or the most practical way of getting a motor vehicle which is disabled or not operating under its own power to the desired destination, the presence of the towing and towed vehicles on the highway for that purpose is not negligence per se; but the towing operation requires the exercise of that care which ordinarily prudent persons would exercise under the existing conditions or circumstances, or commensurate with the known or reasonably foreseeable dangers incident to the operation."

If the towing operation involves an obstruction of the highway, the operator must use the care which a reasonably prudent person would exercise while engaged in that operation, with its known and reasonably foreseeable hazards. (Annotation, 30 A.L.R. 2d 1019, 1025.) The tow truck operator may be found negligent in failing to maintain and use an effective lighting system or equipment. (Annotation, 30 A.L.R. 2d 1019, 1027.) Further (30 A.L.R. 2d 1019, 1028):

> "The use or misuse of headlights during a towing operation in such a manner that it is made to appear to an approaching motorist that there is merely a lighted vehicle coming toward him, calculated to induce him to pass without warning that there is an obstruction behind the lights in addition to the vehicle to which they belong, may constitute negligence and result in liability for

damage due to collision with such obstruction in attempted passage."

In *Goodman v. Keeshin Motor Express Co.* (1934), 278 Ill.App. 227, the defendant's truck, headed west, became mired after its right wheels went onto the shoulder of the road. The driver of a cattle truck, headed east, undertook to tow defendant's truck eastward by fastening the rear of the cattle truck to the rear of defendant's truck. The plaintiff approached from the east, going west, and, seeing the cattle truck lights, attempted to pass on the right and ran into defendant's truck. In holding that the questions of negligence and contributory negligence were for the jury to determine, the Court stated (278 Ill.App. 227, at 231):

"The situation presented a kind of trap for any vehicle approaching from the east."

And further:

". . . the situation was one well calculated to mislead the driver of a westbound automobile into believing that he could pass the cattle truck to the right with safety. He would not know of the presence of the defendant's truck until too late to avoid a collision. *Defendant driver should at least have sent his helper eastward to warn any automobiles coming from the east of the conditions, and the jury could properly consider his failure to do this as negligence.*" (Emphasis added.)

Here, also, a man was present (Zektzer) who could have been sent down the road to warn vehicles coming

from the east of the danger, and the District Court could properly consider Nation's failure to do so as negligence.

Under somewhat similar circumstances, the driver of the towing vehicle was found to be negligent in *Smith v. Litton* (1950, La.App.), 47 So.2d 411, although there was a person sent out on the highway to warn approaching traffic.* The Louisiana Court held that (p. 413):

> "Defendant Litton was negligent in having no flares placed out to warn traffic approaching the scene of the towing operation. The Litton truck obstructed its left (south) side of the road and its headlights were pointed in a southwesterly direction. . . . Litton was further negligent in placing his truck on its left side of the highway and creating a situation where the driver of an oncoming car might logically be misled in the darkness by the unusual situation of having a car blocking the south side of the highway, but with its lights pointing westward."

See also,

Osterode v. Almquist, supra, 89 Cal.App.2d 15, 18, 200 P.2d 169.

Considering the case as a whole, it is submitted that the District Court was entitled to find, *as a fact,* that the defendant Nation was negligent in unnecessarily blocking the westbound lane of the highway in

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*For this reason and because the vehicle being towed was in front of the towing vehicle and visible under its headlights, the plaintiff's driver also was found to be negligent. Neither circumstance was present here, and, in any event, the Louisiana court simply affirmed the judgment.

such a manner as to create a "trap" and without placing proper or adequate warning lights or signals upon the highway, and in failing to use his headlights properly, and in failing to use his boom lights in such a manner as to indicate the position of the tow truck on the highway, and in failing to send Zektzer down the highway to warn approaching westbound vehicles, and in failing to move off the highway when he saw the decedents' Buick approaching and realized that the driver thereof apparently was unaware of the danger.

The position assumed by the appellants must necessarily be that, *as a matter of law,* there was no evidence which would support a finding of negligence on the part of Nation. But the cases cited by them do not sustain that position. There were different facts in each such case and in none of the cited cases did it appear that the appellate Court decided the negligence and contributory negligence questions as questions of law.

For example, in *Kastler v. Tures, supra,* 199 Wisc. 120, 210 N.W. 415, the jury returned a special verdict for the plaintiff (operator of the service car), but the trial Court granted what was in effect a judgment notwithstanding the verdict in favor of the defendant (operator of the vehicle which ran into the service car). The service car had its headlights on and there was a man on the highway waving a flashlight. It was admitted that there was ample room for cars going in either direction to pass on the highway. In reversing the judgment notwithstanding the verdict, the Wis-

consin Court simply held that the issues of negligence, contributory negligence and proximate cause were for the jury and should not have been decided as issues of law. That such was the decision is shown by the Court's statements with reference to the facts which the jury was entitled to find. (210 N.W. at 417.)

What was implicit in the decision in the *Kastler* case was made explicit by the Court in *Henry v. S. Liebovitz & Sons* (1933) 312 Pa. 397, 167 A. 304, also cited by appellants. Judgment for the plaintiff was reversed because of an error in the instructions, but the Court stated (167 A. at 304):

> "As a new trial must be granted, we shall not discuss appellant's contention that its motion for judgment n.o.v. should have been allowed for want of negligence and because decedent's negligence contributed. We are satisfied that, on the record presented, *those questions were for the jury.*" (Emphasis added.)

It may be noted also that, in referring to the statute dealing with stopping on the highway, the Court predicated its discussion upon the assumption that the towing operation "required" the temporary use of the highway. (167 A. at 305.)

Appellants also cited *Bowmaster v. William H. De Pree Co.* (1932), 258 Mich. 538, 242 N.W. 755, but an entirely different accident was involved there. The De Pree truck was stopped on the highway with its lights on. Decedent, also driving a truck, saw the De Pree truck and stopped on the highway about fif-

teen to twenty feet in front of it in such a manner as to block the view of the lights of the De Pree truck. There was no reason for the decedent to leave his truck on the highway in such a manner. The defendant Van Ark then came along and hit decedent's truck. The Michigan Court recognized that the situation might have been different if the decedent had been misled by the position of the De Pree truck. Thus, it was said (242 N.W. at 744):

> "But the plaintiff insists that they were negligent in parking their truck on the wrong side of the road so that it was facing west directly in the way of traffic coming from that direction. There would be some merit in this contention if decedent had been misled by the position of the truck and had driven off the south side of the road in the belief that the truck was coming toward him on the north side. But the accident did not happen in that way."

Again, the Michigan Court did not decide the case as a matter of law, but it simply affirmed the judgment.

In *McNair v. Berger* (1932), 94 Mont. 441, 15 P. 2d 834, the wrecker had its headlights on and there was a spread light between them. There was ample room on the paved part of the highway to allow cars to pass it. The Court also recognized that the question of defendant's negligence is generally for the jury (15 P. 2d at 836), and the judgment was affirmed.

III

CONTRIBUTORY NEGLIGENCE WAS AT LEAST A QUESTION OF FACT.

A. Appellants failed to sustain their burden of pleading and proving contributory negligence.

Appellants' answers to the complaints in each case alleged, as an affirmative defense, that any injuries or damages resulting from the accident "were solely caused or contributed to by the gross and wanton negligence of General Grant Greer, Jr." (pp. 13-14, 16.) There was no allegation in either answer that Mrs. Greer was negligent in any way or that any alleged negligence of Mr. Greer should or could be imputed to her for any reason.

The defense so raised by appellants was an affirmative one and they had the burden of proving it. (*Pearson & Dickerson Contractors, Inc. v. Harrington, supra,* 60 Ariz. 354, 137 P. 2d 237, 239-240.) But appellants concede that there is no "direct evidence as to who was driving the Buick automobile." (Appellants' Brief, p. 20.) Appellants refer to the "driver of the Buick, whoever it may have been" (Appellants' Brief, p. 20), and they advance several arguments on the "assumption" that Mr. Greer was driving the Buick. (Appellants' Brief, pp. 27, 31.) Appellants, therefore, have admitted that the affirmative defense raised by them was not proved by "direct evidence," but is, on the contrary, founded upon an "assumption." It necessarily follows that appellants failed to sustain their burden of proving by a preponderance of the evidence that Mr. Greer was guilty

of negligence. If he were a guest in the car, the negligence, if any, of the driver thereof could not be imputed to him in the absence of pleading and proof of a joint enterprise wherein he had a joint right of control over the driving of the car. (*Salt River etc. Association v. Green, supra,* 56 Ariz. 22, 104 P. 2d 162, 164.)

Appellants claim, however, that "the undertaking was a joint enterprise and each of the Greers had equal interests and rights in the conduct of the trip and in the control of the automobile" (Appellants' Brief, p. 32), that the alleged negligence of Mr. Greer should be imputed to Mrs. Greer, and that Mrs. Greer was independently negligent. (Appellants' Brief, pp. 33-34.) This argument is made for the first time on appeal. The answers do not allege a joint venture nor was any claim made in the answers that Mrs. Greer was guilty of any personal negligence. The sole affirmative defense of this character raised by the answers was the defense that the sole cause of the accident was the alleged negligence of Mr. Greer. (pp. 13-14, 16.)

Neither is there any evidence that "the undertaking was a joint enterprise" or that "each of the Greers had equal interests and rights in the conduct of the trip and in the control of the automobile". In fact, appellants frankly concede that joint enterprise was not proved, for they state (Appellants' Brief, p. 31):

> "General Grant Greer, Jr., and Rubby Greer, were traveling in a Buick car owned by the United Church of God in Christ. The record does not disclose whether one or both arranged to, and bor-

rowed the car. It does not disclose the purpose of their venture, or whether both shared the driving responsibilities."

It may be added that the record does not show which of the Greers was the driver and which was the passenger, or whether the passenger was awake or asleep, or whether the passenger was in any position to observe the road, or any other facts relative to a claim of joint control or personal negligence on the part of the passenger. In the absence of *both* pleading and proof of such facts, there was no basis for any finding in favor of defendants relative to such affirmative defenses. (*Melville v. State of Maryland* (1946, 4th Cir.), 155 F. 2d 440, 443; see Restatement, Torts, sec. 491, comment c.) Alleged negligence of a driver cannot be imputed to a guest or passenger unless the latter had the right to control the operation of the vehicle, and the burden of proving such control was upon the defendants. (*Kocher v. Creston Transfer Co.* (1948, 3rd Cir.), 166 F. 2d 680, 684-687.) The mere fact that the driver and guest are husband and wife, or vice versa, does not alter the rule; a joint right of control must still be shown. (*Weller v. Fish Transport Co.* (1937), 123 Conn. 49, 54, 192 A. 317, 320; *Chandler v. Dugan,* 70 Wyo. 439, 251 P. 2d 580, 586; see, also, *Trefzer v. Stiles* (1952), 56 N.M. 296, 243 P.2d 605, 607.)

B. In any event, the evidence does not show that the driver of the Buick was guilty of contributory negligence as a matter of law.

As already has been shown, the defense of contributory negligence is ordinarily a question of fact and in Arizona that defense is a question of fact "in all cases whatsoever". (Ariz. Const., art. 18, sec. 5.) Moreover, the District Court had ample reason for finding, as a fact, that the defendants had failed to sustain their burden of proving the affirmative defense alleged.

As held in *Winder & Son, Inc. v. Blaine, supra,* 218 Ind. 68, 29 N.E. 2d 987, 989, the driver of the Buick had a right to assume that there would not be a truck stopped on the highway without headlights and without the warning signals required by law.

Furthermore, the District Court, as the trier of fact, could find that the driver of the Buick was suddenly and unexpectedly confronted with the lights of defendant's truck as the Buick came up the hill, passed the knoll and rounded the curve and that such driver could not determine at first whether the lights were from an approaching vehicle or from one standing on the wrong side of the road. (See *St. Johnbury Trucking Co. v. Rollins, supra,* 145 Me. 217, 74 A. 2d 465, 467.) As stated in *Goodman v. Keeshin Motor Express Co.* (1934), 278 Ill. App. 227, 231:

> "The situation preesnted a kind of trap for any vehicle approaching from the east."

Under such circumstances, it was not contributory negligence as a matter of law for the Buick driver to

keep to the right in order to pass the tow truck on the right for he was required by law to do so. (Arizona Code Annotated, 1939, 1952 Supplement, secs. 66-163, 66-163a.) Such driver had a right to assume, until the contrary appeared, that the tow truck would not be on the wrong side of the highway on a curve in violation of the statute. (Arizona Code Annotated, 1939, 1952 Supplement, sec. 66-163e.)

Appellants argue as though the trial Court was compelled to accept wholly the testimony of defendant Nation, notwithstanding the contradictions therein. But there were many reasons why the trial Court could reject that testimony. The trier of fact could consider, for example, the fact that it is highly unlikely that Nation could have watched the headlights of the Buick at a distance of a half mile or so and determined its speed "within a matter of a second." (p. 96.) The trial Court could also find that it was impossible to judge the speed of a car at a distance of a half mile, at night, by the sound of its tires. (p. 136.) Indeed, the Court reasonably could find that Nation did not hear the sound of the tires at all, for his motor and winch were running and making noise and Nation was sitting in the cab. (p. 140.)

The trial Court could also take into consideration the fact that Nation admitted to false testimony. At the coroner's inquest Nation testified that he first saw the Buick when it was only 150 yards away (pp. 106-107; see Exhibit 20 at page 17 thereof), while at the trial he claimed that he saw the Buick when it was a half mile to three fourths of a mile away.

(p. 96.) Nation never explained this enormous change in testimony, although he had ample opportunity to do so. Hence, the trial Court was justified in rejecting his testimony. (*Andruss v. Nieto, supra,* 112 F. 2d 250, 252.)

In finding that excessive speed had not been established by a preponderance of the evidence, the trial Court could further rely upon the fact that the Buick had been averaging only 47 miles per hour during the last 274 miles. (p. 145.) A considerable portion of this distance must have been covered during the daytime since the Buick left the check point at the New Mexico border at about 4:25 P.M. (p. 131.) There is no *prima facie* speed limit on state highways in Arizona except at nighttime, which is defined as the time between a half hour after sunset to a half hour before sunrise. (Arizona Code Annotated, 1939, 1952 Supplement, sec. 66-157a.) There was no evidence that the Buick stopped anywhere along the way, and it passed through only four or five towns, most of which were mere villages.

Other facts which the trial Court could take into consideration were these: The tow truck was stopped on the highway at a curve. (pp. 67-68.) As a vehicle approached from the east, a knoll about fifteen feet high on the right side would obstruct the view. (pp. 53, 67.) The driver of the Buick could not have seen the truck equipment at all from a distance of a quarter mile away until he or she was within 150 yards of it. (pp. 83-84.) The tow truck had only its parking lights on (pp. 97-107), and it was in such a posi-

tion as to block or obstruct the view of the Zektzer truck. There was evidence that neither the lights on the Zektzer equipment nor the boom lights on the tow truck were burning. (pp. 77, 84.) Nation's testimony that he had put out a fusee to the east of the scene, which fusee was run over by the Buick or another car, was shown to be false (p. 67), or at least the trial Court could so find. Officer Cochran determined that, other than the fusees put out after the accident, there was no other type of warning at the scene of the accident. (p. 68.)

Finally, even if it were found that the Buick was traveling at an excessive rate of speed, such fact would not establish contributory negligence unless such rate of speed was a proximate cause of the accident, and that ordinarily presents a question of fact. (See, e.g., *Butane Corporation v. Kirby, supra,* 66 Ariz. 272, 187 P. 2d 325, 330; *McIver v. Allen,* 33 Ariz. 28, 262 P. 5; *Marchese v. Methany,* 23 Ariz. 333, 203 P. 567.) The District Court could consider the fact that the driver of the Buick kept to the right, attempting to pass the tow truck on the right, and was obviously deceived by the situation created by the defendant Nation. (See *Hatch v. Daniels,* 96 Vt. 89, 117 A. 105.)

Appellants' argument seems to be that the Greers, parents of seven minor children, deliberately ran into the Zektzer truck, thereby committing suicide. But, as stated in 20 Am. Jur. 214:

> "One is presumed to give heed to instincts of safety and self-preservation."

And (20 Am. Jur. 215):

> "Ordinarily, the presumption which the law indulges in this regard is that one will take ordinary care of his person and property. This rule is especially applicable to actions for wrongful death."

The presumption that a person acts for his own safety is a part of the common law. (*State of Utah v. Busby* (1942), 102 Utah 416, 131 P. 2d 510, 512.) It is founded on a law of nature—the universal instinct of self-preservation. (*Baltimore & P.R. Co. v. Landrigan* (1903), 191 U.S. 461, 474, 48 L.Ed. 262, 267, 24 S.Ct. 137.)

C. The evidence would support a finding that the last clear chance doctrine was applicable.

The rule of last clear chance applies in Arizona both in cases where the defendant saw the plaintiff's peril and where, in the exercise of reasonable care, he would have been the plaintiff's peril. (*Casey v. Marshall* (1946), 64 Ariz. 232, 168 P. 2d 240, and 64 Ariz. 260, 169 P. 2d 84, 85.)

If it is found that the elements comprising the last clear chance rule are present, then it must necessarily be further found that the defense of contributory negligence has not been established. (See, e.g., the instruction approved in *Root v. Pacific Greyhound Lines* (1948), 84 Cal. App. 2d 135, 137, 190 P. 2d 48, and the discussion in *Girdner v. Union Oil Co.* (1932), 216 Cal. 197, 202, 13 P. 2d 915.)

Since any negligence of a plaintiff or decedent is not a proximate cause of the accident in last clear chance cases, it is immaterial in such cases whether or not it may be said that his negligence continues up to the very point of collision. (*Peterson v. Burkhalter* (1951), 38 Cal. 2d 107, 111, 237 P. 2d 977; *Selinsky v. Olsen* (1951), 38 Cal. 2d 102, 104-105, 237 P. 2d 645; *Bragg v. Smith* (1948), 87 Cal. App. 2d 11, 14, 195 P. 2d 546.)

The following testimony of the defendant Nation shows that the last clear chance rule is applicable (pp. 104-105):

"Q. Now, it was at that point when you observed this car coming at 100 miles an hour, about half a mile away, that you commenced to flash your headlights on and off, right?

A. Yes, sir.

Q. And I take it the reason you did that was that you felt that you should try to warn him?

A. Yes, sir; he was not slowing up.

Q. He was not slowing up. *And I take it from your observation he was completely unaware of the danger he had gotten himself into, right?*

A. *Yes, sir.*

Q. Now, at that time, you were seated behind the steering wheel of your car?

A. Yes, sir.

Q. And your motor was running?

A. Yes, sir.

Q. And did you continue to blink your lights?

A. Yes, sir.

Q. And blinked them right up until the impact with your tow truck?

A. Blinked them until just before the impact."

Nation further testified (p. 142):

"Q. And your estimation of the time that elapsed from the time that you first noticed this danger until this accident occurred was approximately twenty seconds?

A. Somewhere around there, yes.

Q. It could have been a little more, right?

A. Could have been; I am not sure.

Q. So that I understand you, having watched the Buick approach all the time when it was, say, oh, 2,300 feet away, you still saw it still going a hundred miles an hour, right?

A. Right.

Q. And the same when it was 2,000 feet away?

A. Yes, sir.

Q. And 1,700 feet away?

A. I didn't see any change at all.

Q. So from the entire time you saw it, you observed it constantly, and until the time it approached you, you observed it was not changing its speed in any way, correct?

A. That is right, sir."

Nation also testified as follows (p. 103):

"Q. Therefore, it is a fair statement, is it not, to say that from the time you observed this car approaching you a half a mile away at 100 miles an hour, you made no attempt of any kind or character to back up your tow truck off the highway, did you?

A. No, sir."

Subsequently, after the noon recess and after other witnesses had testified, the defendant Nation was recalled as a witness by his own counsel. He then

claimed that he did not have time to move after he saw there was trouble because he would have had to get out of his truck to disengage the winch. (p. 136.) He claimed that he could not back up when the winch was running because the gears would lock up and lock the back wheels. (p. 141.) But the trial Court was not compelled to accept Nation's belated attempt to excuse his conduct. In the first place, Nation testified in his deposition that he did not back up because he "was afraid to move." (Deposition of Nation, p. 48, being Exhibit 22.) Secondly, Nation had previously stated at the trial that he put his foot on the brake to keep the truck from rolling back while the winch was operating. (pp. 93-94.) Thirdly, when Nation was examined by plaintiff's counsel concerning the fact that he did not attempt to move after noticing the danger, he made no mention of any such excuse. (p. 103.) In the fourth place, in attempting to explain how he could hear the sound of the Buick's tires, Nation testified that he "stopped the winch" so that the noise died down. (p. 143.) Finally, Zektzer was present and no reason was given as to why he could not have either operated the winch lever or gone out on the highway to warn the approaching car.

Under these circumstances, it is submitted that the application of last clear chance was a factual question to be resolved by the trial Court.

D. The evidence would support a finding that Nation's conduct was wilful and wanton.

As has been shown, the evidence does not establish that it was necessary for Nation to block the west-

bound lane in order to conduct his winching operation. He already had made an unsuccessful attempt to pull the truck uphill from the front and, in doing so, he did not block the highway. No explanation was given for his position on the highway in winching the Zektzer truck from the rear. If, as the trial Court was entitled to find, the defendant Nation intentionally and unnecessarily stopped on the highway at night on a curve and behind a knoll and in such a manner as completely to obstruct the westbound lane, without adequate warning signals, and if, as Nation himself claimed, the nature of his winching operation was such that he could not move off the highway when he saw a car approaching a half mile to three fourths of a mile away, then a finding of wilful and wanton misconduct on the part of Nation is justified by the evidence. Under such circumstances, the trial Court could reasonably find that Nation's conduct "was a wanton disregard of the rights and safety of the traveling public." (*St. Johnbury Trucking Co. v. Rollins, supra,* 145 Me. 311, 74 A. 2d 465, 466; see, also, *Alabam Freight Lines v. Phoenix Bakery* (1946) 64 Ariz. 101, 166 P. 2d 816, 819; Restatement, Torts, sec. 500.)

And where the defendant's conduct is wilful and wanton, contributory negligence is not a defense. (*Womack v. Preach,* 64 Ariz. 61, 163 P. 2d 280, 283, 165 P. 2d 657, 659.)

CONCLUSION.

We submit that the questions of negligence and contributory negligence were no more than factual ones which were properly determined by the trial Court and that, there being no substantial question of law presented, the judgments should be affirmed.

Dated: October 8, 1955.

Respectfully submitted,

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No. 14749

IN THE

United States

Court of Appeals

For the Ninth Circuit

GRIFFEN BUICK, INC.,
a corporation, and
J. W. NATION, *Appellants,*

vs.

LONDON EVANS, Administrator
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GRANT GREER, JR., Deceased,
Appellee.

GRIFFEN BUICK, INC.,
a Corporation, and
J. W. NATION, *Appellants,*

vs.

LONDON EVANS, Administrator
of the Estate of
RUBBY GREER, Deceased.
Appellee

Appeal from the United States District Court
for the District of Arizona

APPELLANTS CLOSING BRIEF

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TABLE OF AUTHORITIES CITED

TABLE of CASES

Page

ASHE vs. HUGHES
69 So. 2nd 210 22

BARRY vs. SOUTHERN PAC. Co.
64 Ariz. 116; 165 P. 2d 825 22

BELL, CENTRAL ARIZONA LIGHT & POWER CO. vs.
49 Ariz. 99; 64 P. 2d 1249 4

BILLAR, KRAUTH vs.
71 Ariz. 298; 226 P. 2d 1012 ..... 15, 17

BLAINE, WINDER & SON, INC. vs.
218 Ind. 68; 29 N.E. wd. 987 3

CASEY vs. MARSHALL
64 Ariz. 323; 168 P. 2d 240; 64 Ariz. 260;
199 P. 2d. 184 21

CENTRAL ARIZONA LIGHT & POWER CO. vs.
BELL 49 Ariz. 99; 64 P. 2d. 1249 4

CITY OF PHOENIX, LOPEZ vs.
77 Ariz. 46; 268 P. 2d. 323 15

CITY OF PHOENIX, NICHOLS vs.
68 Ariz. 124; 202 P. 201 ..... 4, 17

CITIZENS UTILITIES CO. vs. FIREMEN'S INS.
CO. 73 Ariz. 299; 240 P. 2d. 869 2

COTE, SPANG vs.
68 A. 2d. 823 17

DEERE vs. SOUTHERN PAC. CO.
123 F. 2d. 438 20

DIETZ vs. MORRIS
98 A. 2d. 537 17

DEL E. WEBB CONSTR. CO., JUENE vs.
76 Ariz. 418; 265 P. 2d. 1076 11

DUKE vs. MITCHELL
122 So. 81 22

ERIE RAILROAD CO. vs. TOMPKINS
304 U.S. 64; 585 S. Ct. 817; 82 L. Ed. 1188;
114 A.L.R. 1487 2

Page

FIREMEN'S INS. CO. vs. CITIZENS UTILITIES CO. 73 Ariz. 299; 240 P. 2d. 869 2

GOODMAN vs. KEESHIN
278 Ill. App. 227 13

HERRON vs. SOUTHERN PAC. CO.
283 U.S. 91; 75 L. Ed. 859; 51 S. Ct. 383 2

HERZBERG vs. WHITE
49 Ariz. 313; 66 P. 2d. 253 ..... 3, 4

HILL, MONAGHAN vs.
140 F. 2d. 31 16

HUGHES, ASHE vs.
69 So. 2d 210 22

JUENE vs. DEL E. WEBB CONSTR. CO.
76 Ariz. 418; 265 P. 2d. 1076 11

KEESHIN MOTOR EXPRESS vs. GOODMAN
278 Ill. App. 227 13

KRAUTH vs. BILLAR
71 Ariz. 298; 226 P. 2d. 1012 ..... 15, 17

LOPEZ vs. CITY OF PHOENIX
77 Ariz. 46; 268 P. 2d. 323 15

MARSHALL, CASEY vs.
64 Ariz. 323; 168 P. 2d. 240; 64 Ariz. 260; 199 P. 2d. 184 21

MAYO vs. TEXAS ARIZONA MOTOR FREIGHT, INC. 70 Ariz. 323; 220 P. 2d. 227 2

MITCHELL, DUKE vs.
122 So. 81 22

MONAGHAN vs. HILL
140 F. 2d. 31 16

MORRIS, DEITZ vs.
98 A. 2d. 537 17

MOTORS INS. CORP. vs. RHOTON
72 Ariz. 416; 236 P. 2d. 839 2

NEW YORK LIFE INS. CO. vs. STONER
109 F. 2d. 874 6

NICHOLS vs. CITY OF PHOENIX
68 Ariz. 124; 202 P. 201 ..... 4, 17

Page
PLEINIS vs. WILSON STORAGE & TRANSFER
66 N.W. 2d. 68 ..... 17, 20
RHOTON vs. MOTORS INS. CORP.
72 Ariz. 416; 236 P. 2d 389 2
ROLLINS vs. ST. JOHNSBURY TRUCKING CO.
145 Me. 217; 74 A. 2d. 465 ..... 3, 22
SCOTT vs. SCOTT
75 Ariz. 116, 252 P. 2d. 571 22
SEILER vs. WHITING
52 Ariz. 542; 84 P. 2d. 452 20
SOUTHERN PAC. CO., BARRY vs.
64 Ariz. 116; 165 P. 2d. 825 22
SOUTHERN PAC. CO., DEERE vs.
123 F. 2d. 438 20
SOUTHERN PAC. CO., HERRON vs.
283 U. S. 91; 75 L.Ed. 859; 51 S. Ct. 383 2
SPANG vs. COTE
68 A. 2d. 823 17
ST. JOHNSBURY TRUCKING CO. vs. ROLLINS
145 Me. 217; 74 A. 2d. 465 ..... 3, 22
STONER, NEW YORK LIFE INS. CO. vs.
109 F. 2d. 874 6
SWIFT vs. TYSON
16 Pet. 1; 10 L.Ed. 865 2
TEXAS ARIZONA MOTOR FREIGHT INC. vs.
MAYO 70 Ariz. 323; 220 P. 2d. 227 2
TOMPKINS, ERIE RAILROAD CO. vs.
304 U.S. 64; 68 S. Ct. 817; 82 L. Ed. 1188;
114 A.L.R. 1487 2
TYSON, SWIFT vs.
16 Pet. 1; 10 L. Ed. 865 2
WHITE, HERZBERG vs.
49 Ariz. 313; 66 P. 2d. 253 ..... 3, 4
WHITING vs. SEILER
52 Ariz. 542; 84 P. 2d. 452 20
WILSON STORAGE & TRANSFER CO., PLEINIS
vs. 66 N.W. 2d. 68 ..... 17, 20
WINDER &SON, INC. vs. BLAINE
218 Ind. 68; 29 N. E. 2d. 1012 3

TABLE OF AUTHORITIES CITED

CONSTITUTIONS

Pages

Arizona Constitution, Article 18, Section 5 2

STATUTES

Arizona Code Annotated 1939 (1952 Cumulative Supplement) cited as A.C.A. 1939 (1952 Cum. Supp.)

Section 171 ..... 6, 22

Section 171 a 6

Section 173 a 3, 4, 5

Section 174 g 3

Section 182 7

Section 182 a 8

TEXTS

30 A.L.R. 2d 1019 22

31 C.J.S. Evidence Section 1341, p. 769-772 5

Restatement of the Law, Torts, Section 480, comment b. 21

Restatement of the Law, Torts, Section 500 22

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Appellee

No. 14749

APPELLANTS CLOSING BRIEF

I

Defendants do not ask that this Court weigh the evidence presented. They ask merely that the Court exercise its prerogative to examine and ascertain whether there is any substantial evidence to support

the Findings of Fact, Conclusions of Law and Judgments entered. Failing to find such evidence the Court should then properly reverse the Judgments and enter judgment for the defendants and each of them.

Defendants cannot agree that the decision in the case of *Herron vs. Southern Pacific Co.* (1930), 283 U.S. 91, 75 L. Ed. 859, 51 S. Ct. 383, was in conflict with *Erie Railroad Co. vs. Tompkins* (1937) 304 U.S. 64, 78; 58 S. Ct. 817; 82 L. Ed. 1188, 1194; 114 A.L.R. 1487. The *Erie case* specifically overruled the case of *Swift vs. Tyson,* 16 Pet. 1; 10 L. Ed. 865, but failed to even mention the decision of the *Herron case.* It is also interesting to note the *Herron case* is directly in point on the very Arizona constitutional provision that plaintiffs raise.

The purpose and intent of Article 18, Sec. 5 of the Arizona Constitution is to reserve to a jury the existence or non-existence of contributory negligence. This provision does not purport to deal with a situation where a jury is waived. Even where a jury is present, the Arizona Supreme Court has consistently held that where the negligence of the plaintiff is the sole cause of an automobile accident, and there is no showing of negligence by the defendant, the question of contributory negligence is not a question of fact to be submitted to the jury and a directed verdict for the defendant should be entered. This, obviously, as a matter of law.

Texas-Arizona Motor Freight Inc. vs. Mayo, 70 Ariz. 323; 220 P. (2d) 227.

Motors Insurance Corp. vs. Rhoton, 72 Ariz. 416; 236 P. (2d) 839.

Citizens Utilities Co. vs. Firemen's Ins. Co., 73 Ariz. 299; 240 P. (2d) 869.

II

THERE IS NO EVIDENCE THAT DEFENDANT NATION VIOLATED ANY APPLICABLE STATUTORY REQUIREMENTS

Plaintiffs point to the stopping of defendant's tow truck on the highway, with only his park lights burning, as evidence of violation of Sections 66-173a. (When Lighted Lamps are Required) and 66-174g. (Lamps on Parked Vehicles) A.C.A. 1939, 1952 Cum. Supp., saying "Such conduct has been held to be negligence per se in similar cases," citing: *St. Johnsbury Trucking Co. vs. Rollins* (1950), 145 Me. 217; 74 Atl. (2d) 465, 466; *Winder & Son, Inc. vs. Blaine* (1940) 218 Ind. 68; 29 NE (2d) 987; *Herzberg vs. White* (1937), 49 Ariz. 313; 66 P. (2d) 253, 256, as evidencing this proposition. Each of these cases is clearly distinguished on the facts. The *St. Johnsbury case* involved no flares or fusees and there defendant's vehicle was upon the highway at night, during a snow storm, and completely unlighted although its lights were in good working condition. There were no headlights or danger signals present in the *Windsor & Son, Inc. case* and the defendant in that instance admittedly violated two specific statutory requirements which required the two front headlights to be lighted and two brilliant burning danger or caution signals to be placed along the highway. The *Herzberg case* has only one light of any sort involved. That was a surgical pencil flashlight directed toward the flat tire of the stopped automobile and there was no evidence of signal lights, warning flares or blinking headlights present there as there are in the case before this Court. None of these cases are authority for the claim that defendant Nation's acts were any evidence of a statutory violation.

It is true that the failure to comply with a proven statutory direction would be prima facie evidence of negligence. Such a failure alone would not be actionable unless proven to be the proximate cause of the ensuing injuries and damages.

Herzberg vs. White,
49 Ariz. 313; 66 P. (2d) 253.
Nichols vs. City of Phoenix,
68 Ariz. 124; 202 Pac. 201, 207.

Where the proximate cause of the injuries is one of a number of acts, none or only one of which could be charged to a defendant, there is nothing to submit to a jury because the only basis for the verdict would be guess or conjecture.

Central Arizona Light & Power Co. vs. Bell, 49 Ariz. 99; 64 P. (2d) 1249, 1255.

It is the plaintiff's burden to prove that any claimed negligence on the part of the defendant was the proximate cause of the injuries and the damages.

Nichols vs. City of Phoenix, 68 Ariz. 124; 202 P. (2d) 201, 208.

The record fails to show any such evidence or proof.

Plaintiffs contend (Brief for Appellee, pages 15 & 16) that the tow truck's headlights should have been burning and that by merely having the parking lights burning defendant Nation violated Section 66-173a. A.C.A. 1939, 1952 Cum. Supp. There is no such statutory requirement:

"66-173a. When lighted lamps are required.—Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible persons and vehicles on the highway at a distance of 500 feet ahead shall display lighted

> lamps and illumniating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles as hereinafter stated."

There is no requirement that headlights as distinguished from parking lights be burning, but only a requirement that "lighted lamps and illuminating devices" be used.

This section specifically excepted parked vehicles and plaintiffs seem to contend that defendant's tow truck was a parked vehicle, arguing that defendant Nation violated Section 66-173a. A.C.A. 1939, 1952 Cum. Supp., entitled, "Lamps on parked vehicles." This statute requires in subparagraph (b) only that parked vehicle

> "... be equipped with one (1) or more lamps which shall exhibit a white light on the roadway side visible from a distance of 500 feet to the front of such vehicle...".

In this regard there is no evidence whatsoever that the that the tow truck's parking lights did not comply with this requirement. Without such evidence it is presumed that such compliance was present. 31 C.J.S. Evidence, Sec. 1341, pages 769-772.

At sub-paragraph (c) the statute states, "Any lighted headlamps upon a parked vehicle shall be depressed or dimmed."

These two sub-paragraphs of the statute show that it comprehends the use of lights different from bright head lamps on parked vehicles and makes obvious that the purpose of the statute is to require stopped vehicles to use dimmed or weakened lights to distinguish them from moving vehicles which use bright driving lights.

Sub-paragraph (a) of this statute permits a vehicle to stop without showing any lights when there is suf-

ficient light to reveal any person or object within a distance of 500 feet. Nation testified that as he approached the disabled tractor trailer unit that it was visible without any lights for a distance of between 150 and 200 yards" (T 133). It was a starlight night with no clouds (T 70). These facts are neither disputed or questoned by inference. Under this state of the evidence the statute would require no lights whatsoever upon the stopped vehicles.

Plaintiffs concede that the tow truck would be permitted by Section 66-171 a. A.C.A. 1939, (1952 Cum. Supp.) to be stopped upon the highway to conduct proper towing operations but they argue that it was "practicable" for defendant Nation to stop elsewhere. By using the word "practicable" Section 66-171 A.C.A. 1939 (1952 Cum. Supp.) prescribes a very flexible standard and does not require a showing of "any imperative necessity of blocking the highway in the middle of the night in order to extricate the truck" (Brief of Appellee, page 18). It is the general rule that a party asserting the affirmative of an issue, in this case the statutory violation, has the burden of proving such a violation.

New York Life Ins. Co. vs. Stoner, (CCA 8th-1940) 109 F. (2d) 874, 876.

It is obvious why it was "practicable" and necessary for the tow truck to occupy a portion of the highway. The disabled tractor trailer unit was parallel to and approximately four feet north of the north edge of the pavement (T 54-56). If the tow truck pulled the disabled equipment directly to the rear of the unit, it could never have regained the highway, but would merely travel along the shoulder. It would be absolutely necessary to pull it in a southeasterly direction to regain

the pavement and of necessity the tow truck would have to be either upon or across the pavement to do so.

Plaintiffs attempt to infer impeachment of defendant Nation's testimony by saying (Brief of Appellee, page 17):

> "If, as Nation told Officer Cochran, the tractor was not disabled but was simply stuck in the sand (pp. 65) . . . there would appear to be no good reason why the tow truck had to block the westbound lane of the highway at the time of the accident."

While this statement is undoubtedly inadvertent, it is actually misleading and the very query is self-destructive. Defendant Nation's testimony established the disability of the tractor (T 88-89, Plaintiffs' exhibit 22 in evidence at page 6, lines 2-14 and page 9, lines 6-21), while Officer Cochran's testimony (T 65) was,

> "A. I asked what had happened, and he stated that he had been called to pull the semi out of the sand, that it got stuck off the road in the deep sand, and that he had attempted to pull it out in a southeasterly direction, but had succeeded in putting it deeper into the sand, and then had reversed the procedure, and had gone to the back of the semi-hooking onto the back of it, and watching it back, and had almost got it back out of the sand *where he could drag it back up on the road.*" (Emphasis added)

This testimony confirms rather than conflicts with defendant Nation's testimony and establishes that it was necessary (1) to free the tractor trailer from the sand, and (2) to "drag it back up on the road." This second action would be unnecessary if the tractor's engine were capable of operation.

It is claimed that defendant violated Section 66-182, A.C.A. 1939, 1952 Cum. Supp., which prescribes that

motor trucks shall carry certain flares and lanterns at night. Defendant wholly fails to see that this could be ascribed as any cause of the accident, much less a proximate cause.

Plaintiffs next advance Section 66-182a, relating to display of warning devices when a vehicle is disabled as a statutory violation by defendant Nation. It is admitted that no flare, fusee or reflector was placed along side the stopped equipment. However, this failure could in no way be a proximate cause of the accident. It would have been a futile effort in view of the fact that the location of the tow truck would have hidden it from the view of the Buick driver and would have been a futile effort since the lights on the rear end of the trailer (T 85, 96), together with the red boom light and the white boom light focusing on the rear end of the semi-trailer from the tow truck would have obliterated any vision of it by their concentrated brilliance.

Plaintiffs make no claim that the placement of the fusees to the east and to the west of the stopped equipment (T 90-91, 81, 82) fails to meet the statutory requirements. Rather, they complain that defendant Nation used red magnesium fusees instead of flares which are defined as "pot torches" by the statute.

The purpose and intent of the statute is to require a warning light to be placed at least 100 feet in each direction from the equipment and a warning light at the location of the equipment to notify other users of the highway of the presence of stopped equipment. This purpose and intent were fully met by defendant Nation.

Officer Cochran testified that red magnesium fusees were visible for one and one-half to two miles (T 85). It is common knowledge that the flame of a "pot torch" variety flare is not visible at such distances. Reflectors

are recognized by the statute as a substitute for flares ("pot torches"). Reflectors by their very nature, are not visible until activated by light striking them and they could not be activated until they were within the range of an approaching automobile's lights.

Defendant Nation's affirmative testimony established that a fusee and a reflector were in place (T 90-91, 81-82), burning and visible (T 137) 300 feet east of the stopped equipment immediately before the accident; and there were at least eight lighted lights on the rear of the semi trailer (T 85, 96); a red and white light from the boom of the tow truck were shining on the rear of the semi trailer (T 97, 199-101, 134) and the parking lights were lighted on the front of the tow truck. A fusee and reflector were placed 300 feet west of the equipment (T 97).

Plaintiffs attempt to meet this evidence by saying that Officer Cochran determined that no other type of warning, other than fusees were at the scene and that defendant Nation did not mention to the officer anything about putting out reflectors. The officer's testimony in this regard (T- 68-69) establishes only that he did not see any other type of warnings and that he recalls no mention being made to him relative to glass reflectors. However, Officer Cochran testified at the inquest, three days after the accident, and there said both Nation and Zekster (driver of the stalled equipment) had told him that "they had put out both flares and reflectors." The officer continued to state, "That is true in the sense that when I arrived they were out and they stated that they were out prior to the accident . . ." (Plaintiffs' Exhibit 22 in evidence, at page 8, lines 19-24). Again plaintiffs complain that defendant Nation was contradicted by the following testimony of Officer Cochran (T 67):

"Q. Did he state to you that the fusee burning at the time you arrived was the same one burning at the time of accident happened?

A. No. I believe that he stated that there had been two sets of fusees put out, and that the first one was the one that had been run over.

Q. I see.

A. By either the Buick that had run under the semi, or some car following close behind.

Q. When he referred to the fusees that had been run over, did he refer to the one that was out at the time of the accident on the eastern side of the point of impact?

A. Yes.

Q. Did you, Officer, make a search for the damaged or run-over fusee.

A. Yes, I did.

Q. Were you able to find any evidence of any damage to a run-over fusee?

A. I looked for it that night, and also went back the next morning to check the scene, and I could find no damaged flare."

This testimony establishes only that the officer failed to find a damaged flare. It does not define the area or the extent of the search. It points up the common interchangeable use of the words "flare" and "fusee." In this regard Cochran (T 69) states that defendant Nation may have been referring to a "reflector-type of flare" rather than a fusee that the Buick had run over and at the inquest defendant Nation testified when asked whether the Buick had struck any of the flares or reflectors,

"I don't know that. The driver went over the reflector. The other truck driver said he had to go over and straighten it up." (Plaintiffs' Exhibit 20, in evidence, page 18, lines 24-26).

Later Officer Cochran testified that the Buick had run over a highway department reflector, which was set in place one and one-half feet north of the edge of the highway, which denoted the edge of the road. This reflector was located approximately 35 feet east of the point of impact (T 69).

This entire testimony of Cochran was negative testimony and as such did not controvert or dispute the affirmative testimony of defendant Nation and did not constitute any evidence that the warning fusees and reflectors were not in place. *Juene vs. Del E. Webb Const. Co.,* 76 Ariz. 418; 265 P. (2d) 1076, 1079-1080.

The sufficiency of the warnings is established by the undisputed fact that other westbound automobiles saw and safely passed the towing operation (T 137) and by the further undisputed fact that Officer Cochran, well schooled in such matters, on his arrival, put out additional magnesium flares of the type commonly called "fusees." (T 83).

Plaintiffs have not only failed to point out any evidence that any of the alleged statutory violations were the proximate cause of the accident, but have failed to make any showing that defendant Nation violated any of the statutes.

III

DEFENDANT NATION FULFILLED HIS COMMON LAW DUTIES

Statements by the plaintiffs of the general rules of law applying to towing operations (Brief of Appellee, page 22) are not disputed. It is not negligence per se to use the highway in towing operations. The operator of a tow truck must use reasonable care in conducting operations that obstruct the highway. Defendant

Nation used such care. He placed a fusee and reflector 300 feet east of the stopped equipment at the point of the knoll, located where it would be visible to approaching westbound traffic for at least one and one-half miles in advance (T 85). The parking lights were burning on the tow truck (T 97). The rear end of the semi-trailer was brilliantly lighted (T 84-85, 96, 134-135). Defendant Nation utilized every means of warning that was available to him.

Plaintiffs query why the defendant did not send a man on down the road to warn traffic approaching from the east. The only testimony on this point is to the effect that the only other person present, the driver of the stalled equipment, had gotten into his truck at the beginning of the operation and was in the cab of that truck for the purpose of guiding and steering it during the towing operation (Plantiffs' Exhibit 20 in evidence, page 20, lines 1-6; Plantiffs' Exhibit 22 in evidence, page 37, lines 5-20).

The Coronor's jury did not infer that the driver of the stalled equipment "could have been sent down the road to warn vehicles coming from the east" and we submit that neither the District Court nor any reasonable person could draw any inference from this testimony other than it was necessary for that driver to be in the cab of his truck to steer the stalled equipment while it was being towed and that he was not free to be sent down the road as an additional warning measure.

Nor could the District Court properly find as a fact that Nation was negligent in failing to move the tow truck off the highway after realizing the Buick driver was apparently not aware of the dangerous situation being created. Again, the sole evidence was that there were not more than twenty (20) seconds available in

which to move the tow truck (T. 105) and Nation, entirely familiar with the somewhat complicated process necessary to release the winch mechanism so the tow truck's normal driving gears could be used (T. 141), did not, in twenty seconds, have sufficient time in which to so act and move the tow truck from the highway (T. 136).

Plaintiffs apparently now lean heavily upon the theory that defendant Nation used, or misused, his headlights in such a manner that the driver of the Buick automobile was mislead or induced into believing that the tow truck was merely an approaching vehicle moving normally along the highway and that such action entirely failed to give that driver warning of the presence of a stalled semi behind the tow truck.

Plaintiffs cite *Goodman vs. Keeshin Motor Express Co.,* (1934) 278 Ill. App. 227, in support of this theory. The only lights present in that case were the headlights of a stopped tow truck which were described as glaring headlights and which were pointed directly toward the approaching plaintiff, who saw nothing but these headlights and, receiving no other warning signal, passed to the right of the tow truck and collided with the unlighted tow.

If we ignore the evidence of the advance warnings given by means of the red fusee and reflector, the well-lighted rear end of the trailer and the blinking parking and headlights of the tow truck, then it might possibly be said that since the Buick left no skid marks and its wheels left tracks showing it ran off the north side of the highway a mere twenty (20) feet before reaching the tow truck (T81) the driver may have been misled into thinking the tow truck was "merely a lighted vehicle coming toward him" and have been induced to

try to pass to the right of that tow truck without any warning of the presence of the semi which was behind the lights and the tow truck.

If this view were assumed, then why would the Buick leave the pavement only 20 feet from the front of the tow truck? Why didn't the Buick actually drive to the right of the tow truck instead of colliding with it? There was no swerving on the part of the Buick (T101-102).

But such a view cannot be assumed in view of the undisputed evidence. Plaintiffs first complain that defendant Nation violated a statutory requirement by having only his parking lights burning and then argue that those parking lights caused the Buick driver to believe that the tow truck was normally driving along the highway. Had the tow truck's driving lights been on constantly, there would have been a somewhat different situation. But they were first burning on parking beam and then flashing back and forth between the driving beam and the parking beam (T 102).

The evidence further shows that there was warning of the obstruction (the semi-trailer) that was behind the tow truck. This was the large brightly lighted rear end of the trailer. Plaintiffs complain that defendant Nation should have swiveled the boom lights on the tow truck around so that they would shine on the highway directly into the face of the driver of the approaching Buick. Such an action would have diminished the amount of light shining on and lighting up the rear end of the trailer and, additionally, might well have given the appearance of a headlight on an automobile which was normally approaching. The use of the parking lights and the flashing of the parking and headlights could not reasonably be said to give such an impression.

If any trap was present in this situation it was due solely to the Buick driver's failure to drive within the range of his lights, *Krauth vs. Billar,* 71 Ariz. 298; 226 Pac. (2nd) 1012, and was created by the driver's excessive speed. There can be no recovery against defendants for damages so caused.

A claim of entrapment was recently made in *Lopez vs. City of Phoenix* (1954), 77 Ariz. 46; 268 P. 2d. 323, where the plaintiff alleged that the defendant City negligently permitted a trap to exist by maintaining a street that narrowed, or jogged, so that cars traveling on the street must turn slightly to continue along that street. The evidence there showed that the car in which the plaintiff was riding had been traveling at 65 to 70 miles per hour before it failed to make the jog, ran onto the parkway and collided with a pole. The Court held that the situation was apparent to any ordinarily prudent driver in the exercise of due care and that the defendant owed a duty only to a traveler in the exercise of due care who was making a lawful use of the highway, and found for the defendant.

In view of the evidence, together with the advance warnings by fusees and reflector, there is, as a matter of law, no evidence to support plaintiff's claim that defendant was in any manner negligent.

IV

THE ISSUES OF CONTRIBUTORY NEGLIGENCE OR IMPUTED NEGLIGENCE ARE PROPERLY BEFORE THE COURT.

The issues of the imputed negligence, contributory negligence and independent negligence of Ruby Greer, are properly before this Court, having been raised by the District Court's Findings of Fact IV, V and VI (T23-25), Conclusions of Law II (T 25), Defendant's

objections and exceptions to Findings of Fact, Conclusions of Law and Judgments (T 28) and defendant's Statement of Points, Points I, VII, VIII, XIII (T 42-43) filed in the District Court (T 43) and adopted before this Court (T 141).

In an action without a jury appellants may question the sufficiency of evidence to support the findings whether or not they have objected to findings in the trial court or whether or not they moved to amend them or made a motion for judgment. *Monagan vs. Hill* (CAA 9th) 140 F. (2d) 31, 33.

Defendants do not contend no one was driving the Buick. Officer Cochran testified at the inquest proceedings that General Grant Greer was the driver of the Buick (Plaintiff's Exhibit 20 in evidence, page 3, lines 23-25, and at page 5, lines 6-15), and this, being the only evidence, is conclusive and binding upon the defendants.

V

THE DRIVER OF THE BUICK WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW

It has been shown that where the plaintiffs' negligence is the sole cause of an automobile accident and there is no showing of negligence by the defendant, the Court should, as a matter of law, direct a verdict or enter judgment for the defendant.

The lights of the stopped trucks were visible for three-quarters of a mile to the east (T 85) and the red fusees visible for one and one-half to two miles and could be seen for at least three-quarters of a mile to the east. Sometime thereafter the red reflector, located in the center of the westbound traffic lane would become visible to the Buick driver when activated by the

Buick headlights. Hence, the driver had notice of a situation demanding caution at least three-quarters of a mile in advance of reaching the truck's location. Under these circumstances he could not assume that the road ahead was clear. *Nichols vs. City of Phoenix,* 68 Ariz. 124, 202 P. (2d) 201.

In view of these advance warnings he could not have been suddenly and unexpectedly confronted with the situation for the first time upon passing the knoll. If the driver "could not determine at first whether the lights were from an approaching vehicle or from one standing on the wrong side of the road" he had a duty to slow down and to have his car under such control as to be able to stop within the range of his vision, and not rush blindly on in the face of his doubt and the obvious warnings.

Nevertheless, the Buick driver continued to travel at a high speed (T 102), did not swerve (T101-102, 72), or apply the Buick's brakes (T 63). He was guilty of legal negligence. *Krauth vs. Billar,* 71 Ariz. 298, 226 P. (2d) 1012, 1015-1016; *Spang vs. Cote,* 141 Me. 338, 68 Atl. (2d) 823; *Dietz vs. Morris,* 98 Atl. (2d) 537.

Pleinis vs. Wilson Storage & Transfer Co. (1954), 66 N.W. (2d) 68, was a case in which there were no warning fusees but only lighted rear lights on a truck trailer that occupied decedent's side of the highway. Headlights of a second car along side the truck trailer faced the decedent. Both vehicles were stopped. Decedent approached and ran into the rear of the trailer. There were no marks on the pavement that indicated the brakes were applied on decedent's car. The front half of decedent's car was completely demolished. Although this case was tried under a comparative negligence issue, it was determined, as a matter of law, that decedent was negligent. The Court said, page 71:

"In this case the evidence fails to disclose that deceased saw the truck at any point, or that he ever slackened his speed or applied his brakes. He simply struck the truck 'full steam ahead'.

(4) Granting that the vision of deceased was made difficult by the lights of the Mauck car such condition would call for some diminution of speed or care on the part of the deceased, and record affirmatively shows neither diminution of speed nor application of brakes. It is apparent from the recited facts that if the lights of the Mauck car interfered with deceased's vision such interference must have existed for a space of time which would have permitted some action on the part of the deceased. To drive blindly on at the rate of speed deceased was traveling as disclosed by the physical facts, seems to us to be negligence which must be classified as something more than 'slight' ".

Plaintiffs speculated some length on what findings the District Court might have made (Brief of Appellee, pages 32-34). However, the District Court's findings are clearly set forth (T 18, 22) and the issue is whether the facts are undisputed or if in dispute, are of such potency that all reasonable men must reach the same conclusion, namely, that they do not support the findings, conclusions and judgments.

The alleged contradictions in defendant Nation's testimony do not exist. Nation, whose work included testing automobiles at high speeds (T 135), estimated the Buick's speed, not upon the high speed whine of the tires alone (T 136) but also upon the period of time it took the Buick to cover approximately onequarter of a mile (T 96, 102).

Nation's testimony at the trial that he saw the Buick three-quarters of a mile away in the darkness (T 96) obviously referred to the lights of the automobile. His testimony at the inquest, just as clearly referred to

seeing the Buick automobile itself (T 106-107, Plaintiff's Exhibits 20 in evidence, page 17, lines 9-15). At 150 yards, or 450 feet, the Buick would be just rounding the knoll and would be within the area of light cast by the lights of the tow truck and the semi and fusee.

The District Court did not find, and could not reasonably find, under the evidence, that there was no excessive speed. Apparently plaintiffs contend that without a prima facie daytime speed limit on Arizona highways the Buick could properly travel at top speed during the hour or hour and one-half after 4:25 p.m. and cover many of the 274 miles whether in the open country or driving through the City of Tucson. The ruling of the District Court on the proffered evidence, that an unidentified colored sailor stated to defendant Nation at the scene that the Buick had passed him prior to reaching the scene, when the sailor's car was doing 70 miles per hour, is not clear. It is to be noted, however, that Officer Cochran, at the inquest, testified:

> "No, there was a colored fellow there at the time I arrived who stated the Buick had passed him a few miles back but he left the scene and I had not been able to find him. He had not seen the accident but had seen the car before the accident" (Plaintiffs' Exhibit 20 in evidence, page 10, lines 21-25).

Disregarding all other evidence, the extensive damage to the Buick (Plaintiffs' Exhibits 2 thru 8, inclusive, in evidence) to the wrecker and the wrecker boom (T 71-73) and the semi trailer (T 75, Defendant's Exhibits A and B in evidence) could reasonably support no other finding than one of excessive speed.

It is undisputed that the presumption that decedents acted for their own safety would initially be present in this case. This presumption was overcome by the evidence that warnings were either not seen when they

should have been seen, or ignored; that the speed of the Buick was grossly excessive as evidenced by the damage done and the failure of the driver of the Buick to reasonably act to avert the collision. As it was said in *Pleinis vs. Wilson Storage & Transfer Co.,* 66 N.W. (2d) 68, 70:

> "that the deceased was negligent there was no doubt (citations). The physical facts disclosing the negligence of the decedent, the presumption that he was in the exercise of ordinary care disappears."

Further, it is incumbent upon the plaintiff to affirmatively show that defendant's negligence actually existed, not merely that it might have existed. Any presumptions as to defendant's negligence disappear where he denies negligence, and the burden then shifts to the plaintiff to produce affirmative evidence of negligence. *Seiler vs. Whiting* et al, 52 Ariz. 542, 84 P. (2d) 452. This the plaintiff did not do.

VI

LAST CLEAR CHANCE DOCTRINE DOES NOT APPLY

> "It must be kept in mind that the doctrine of last clear chance means just what the words imply and that the very essence of the rule is that it is applicable only where, notwithstanding another's negligence, the defendant, after realizing, or where under the circumstances he should have realized, that that other party cannot escape (due either to awareness or to physical inability, has a clear chance to avoid the accident by the exercise of ordinary care. It is an absolute "requirement of the doctrine of last clear chance that the peril of the party who relies upon it be inescapable or that he be oblivious to it.' " Deere vs. Southern Pac. Co. (1941) (CCA 9th) 123 F. 2d (438).

Decedents could have extricated themselves from their potential danger. Although the Buick was traveling at excessive speed it did not appear to be out of control but came straight down the highway (T 101-102). From the time it was one-half mile east, and continuing up to a point possibly 100 feet east of the scene, the Buick could have pulled over to the left side of the road to pass on the south of the trucks and thereby averted the collision. There was an unobstructed twenty-two and one-half feet of highway there (T 64). Other westbound cars had done so (T 137), and defendant Nation had a right to assume that the driver of the Buick would pay reasonable attention to the fusee, reflector and other lights and so act. Restatement of the Law, Torts, Section 480, Comment b.

The first time Nation believed the Buick driver might be unaware of the potential danger was when the Buick was approximately one-half mile distant (T 104). At that moment it was already too late for Nation to take the necessary action (T 136) to go to the rear of his truck, perform the necessary manipulations to take the winch motor out of operation, return to the truck and move it off the road prior to the arrival of the Buick (T 136, 141). Approximately twenty seconds later the collision occurred.

The defendant must, after having reason to realize the peril involved in plaintiffs' position, be negligent thereafter in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff. *Casey vs. Marshall,* 64 Ariz. 323, 168 P. (2d) 240, 64 Ariz. 260, 169 Pac. (2d) 184. From the moment the Buick was one-half mile distant and Nation realized the potential peril, he then had no existing ability to avoid the collision. From that moment on the driver of the Buick was the only person who had it

in his power to avoid the collision. Defendant Nation had neither the last chance, nor a clear chance.

VII

WILFUL AND WANTON MISCONDUCT IS NOT AN ISSUE

Plaintiffs apparently urge that Nation was wilfully and wantonly negligent upon the sole premise that defendant must show it was "necessary" to be upon the highway during the towing operation. It has been shown that Section 66-171 Arizona Code Annotated 1939 (1952 Cum. Supp.) contains a requirement of "practicable" instead of necessary. The general rule entitled the public to the use and aid of wreckers in returning cars to the highway and such wreckers are entitled to use and even obstruct the highways in the course of that operation when done in the exercise of reasonable care. *Ashe vs. Hughes,* 69 So. (2d) 210; *Duke vs. Mitchell,* 122 So. 81; 30 A.L.R. (2d) 1019, 1025.

The facts in *St. Johnsburg Trucking Co. vs. Rollins,* 145 Me. 311, 74 Atl. (2d) 465, are more consistent as an argument against wilful and wanton negligence being present in this case than they are for the plaintiff's contention. The wanton disregard present in the *St. Johnsburg case* was the defendant's failure to have any lights burning on his vehicle which was stalled on a highway, in a snow storm, at night, despite the fact that the lights were in working condition.

The technical definition of wanton negligence in Arizona is defined in *Barry vs. Southern Pac. Co.,* 64 Ariz. 116, 165 P. (2d) 825, which collects the prior cases and adopts the definition as set forth in Restatement of the Law, Torts, Section 500.

The Court has further defined wanton negligence in *Scott vs. Scott,* 75 Ariz. 116, 252 P. (2d) 571, 575, saying:

> "Wanton negligence is highly potent and when it is present it proclaims itself in no uncertain terms.— It is flagrant and evinces a lawless and destructive spirit."

Defendant Nation's efforts in placing warning signals, together with his entire course of conduct, conclusively show that his actions do not fail within these definitions under any view of the evidence.

Defendants submit to this Court that there is no evidence to support the Findings of Fact, the Conclusions of Law and Judgments, so that it was error for the trial court to have made such findings and conclusions and to have entered the judgments for plaintiff in each case.

Respectfully submitted,

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